Supreme Court, U.S.
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In The
Supreme Court of the United States

KURT D. SHIPLETT
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION D/B/A AMTRAK,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

***Jaimie R. Goodman**
LAW OFFICES OF JAIMIE R. GOODMAN
615 Griswold, Suite 1805
Detroit, MI 48226
(313) 965-5123

Attorney for Petitioner
Counsel of Record

October, 1999

LEGAL ADVANTAGE * 432 Walnut Street * Cincinnati, OH 45202
(800) 581-2252

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QUESTIONS PRESENTED

1. Whether, under the direct threat provisions in Title I of the Americans With Disabilities Act (ADA), 42 U.S.C. §12111(3), an employer can impose requirements excluding individuals who take prescribed medication from employment in safety sensitive jobs without conducting an individualized assessment to determine whether the individual poses a direct threat to the safety of others?

2. Whether the U.S. Court of Appeals for the Sixth Circuit's decision in this case conflicts with this Court's decision in *Bragdon v. Abbott*, 524 U.S. 624 (1998), where the Sixth Circuit, in deciding that the petitioner-employee posed a direct threat to the safety of others under the ADA, deferred to the judgment of respondent-employer's medical professional without assessing the objective reasonableness of the judgment?

3. When an employee with a disability under the ADA requests an accommodation of reassignment to another position but does not identify any vacant positions, should courts then shift the burden of proof to the employer to show that it made a reasonable effort to assist the employee in ascertaining whether there were vacant positions for which the employee was qualified?

4. Whether, in a negligence action under the Federal Employer's Liability Act, 45 U.S.C. §51, a common carrier by railroad can be held liable to an employee for physical and emotional injury damages caused by the railroad's negligently dangerous employment action where the employee suffered physical injuries but did not sustain any actual or threatened impact by a physical object?

PARTIES TO THE PROCEEDING

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kurt D. Shiplett respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Sixth Circuit vacating a judgment on jury verdict in favor of the petitioner was filed on June 17, 1999 and was not recommended for publication. (Appendix A). The Sixth Circuit's order denying petitioner's petition for rehearing was filed on August 2, 1999. (Appendix B). The trial court's judgment on jury verdict was filed on September 24, 1997. (Appendix C). The trial court's order denying respondent's motion for judgment as a matter of law or in the alternative, a new trial was filed on September 24, 1997. (Appendix D).

JURISDICTION

Petitioner seeks review of the judgment and order of the Court of Appeals for the Sixth Circuit, that was entered on June 17, 1999. (App. A). The Sixth Circuit's order denying the petition for rehearing was dated August 2, 1999. (App. B). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND REGULATIONS

The pertinent federal statutes are 42 U.S.C. §§12102(2), 12111(3), (8)-(9), 12112(a),(b)(1) & (5)(A), 12113(a)-(b) of the Americans with Disabilities Act (ADA) and 45 U.S.C. §51 of the Federal Employer's Liability Act

(FELA). The statute which confers jurisdiction in this court is 28 U.S.C. §1254(1). The pertinent federal regulations are 29 C.F.R. §§1630.2(o)(3), 1630.2(r). The pertinent federal statutes and regulations cited above are reproduced in Appendices F1 - F9. There are no constitutional provisions, treaties, state statutes or ordinances at issue.

STATEMENT OF THE CASE

This employment action brought by Petitioner Kurt Shiplett in United States District Court against his employer Respondent National Railroad Passenger Corporation ("Amtrak") raises federal law claims under the Americans with Disabilities Act (ADA) and the Federal Employer's Liability Act (FELA). Shiplett was a locomotive engineer employed by Amtrak. Federal jurisdiction of this action was based on 28 U.S.C. §1331. This case was tried before a jury in federal court. The jury found in favor of Shiplett and awarded him damages against Amtrak in the amount of $500,000.00.

In a nutshell, this case arose because Amtrak regarded Shiplett as having a disability, stereotyping him as a "drug abuser" and "mentally unstable" all because he was taking the prescription medication Xanax. Shiplett took Xanax as prescribed by his physician before bedtime at least eight hours before reporting to work at Amtrak as a locomotive engineer. Without conducting any individualized assessment on whether Shiplett's taking prescription medication adversely affected his ability to safely perform his job, Amtrak mandated on its own that Shiplett was not allowed to return to work as a locomotive engineer if he was taking Xanax. Amtrak not only refused to return Shiplett to work, but refused to reasonably accommodate him by reassigning him to another position.

Instead, Amtrak directed Shiplett to stop taking Xanax immediately if he wanted to return to work. This was a dangerously negligent instruction which caused Shiplett physical injuries and placed him in fear of physical harm.

Shiplett began his employment with Amtrak on September 22, 1986. He held positions with Amtrak as an assistant conductor, conductor and assistant locomotive engineer. In 1990, he was promoted to locomotive engineer and remained in that position until September 15, 1994. By all accounts, Shiplett was a safety conscious locomotive engineer, having received safety awards from Amtrak during his tenure as locomotive engineer. (App. E, p. 8-9).

Shiplett had been taking the prescription medication Xanax to help him sleep at bedtime. From 1992 until September 15, 1994, Shiplett regularly took Xanax only before bedtime, at least eight to ten hours before he reported to work as a locomotive engineer. He never took Xanax while working or when he was subject to duty. He only took one milligram of Xanax as prescribed by his physician. Shiplett's physician advised him that he could take this dosage of Xanax and safely work as a locomotive engineer. (App. E, p. 7-8)

Shiplett informed Amtrak management in 1992 and 1993 that he was taking Xanax. Amtrak advised him that he could take Xanax and work as a locomotive engineer "as long as it had been prescribed by a doctor". (App. A, p. 5). Shiplett experienced no adverse side effects from taking Xanax. His ability to safely operate a locomotive was unimpaired. (App. E, p. 8). Xanax has no side effects on certain individuals. (App. A, p. 3). Prior to September 15,

1994, Amtrak's employment records reflected that Shiplett's overall job and safety performance was above average while he was taking Xanax.

On September 15, 1994, Shiplett overshot a passenger platform while operating the locomotive. As a result, Shiplett was given a drug and alcohol screen by Amtrak. He tested positive for benzodiazepine, a class of drugs which includes Xanax. At that point, Amtrak's medical officer, Dr. Robert McLean became involved. Amtrak's Dr. McLean removed Shiplett from service as a locomotive engineer because he was taking Xanax. Dr. McLean told Shiplett that he had to stop taking Xanax immediately if he wanted to return to work. (App. A, p. 4).

On September 27, 1994, Dr. Gallant was contracted out by Amtrak, to conduct a physical examination of Shiplett. Dr. Gallant advised Shiplett that he was "mentally and physically fit" to return to work and to try to get off the Xanax slowly. Dr. Gallant told Shiplett that taking Xanax at bedtime and working the next day as a locomotive engineer would not be a "safety factor" (App. E, p. 9).

Amtrak still refused to return Shiplett to work unless he stopped taking Xanax. Amtrak's Dr. McLean felt that Xanax "might" have contributed to Shiplett's overshooting the platform on September 15th. (App. A, p. 6). Dr. McLean did not know whether the use of Xanax adversely affected Shiplett's alertness or coordination (App. E, p. 16). This could only be adduced by direct examination. Dr. McLean never tested, examined or even met Shiplett. Dr. McLean never reviewed Shiplett's medical history or performance records. (App. E, p. 13-14, 16, 18).

It was undisputed that Xanax can have no side effects on some individuals. (App. A, p. 3, App. E, p. 19). Yet, Amtrak's Dr. McLean imposed a blanket exclusion of employees who take Xanax from working as locomotive engineers. It did not matter to Amtrak that Shiplett was only taking one milligram of Xanax before bedtime at least 8 to 10 hours before he would work. (App. E, p. 11-13, 19).

There were no governmental regulations prohibiting locomotive engineers from operating a locomotive if they took Xanax as prescribed by a physician. This prohibition was imposed by Amtrak's medical officer Dr. McLean and not by any governmental agency. (App. E, p. 20).[1]

Once Amtrak refused to return Shiplett to work as a locomotive engineer, he requested an accommodation to return to work in another position. Shiplett asked Dr. McLean in the end of September, 1994 that he be allowed to return to work in another position. Amtrak's Dr. McLean did not deny that such an accommodation request was made, stating he had no recollection as to whether such a request for accommodation was made. Amtrak made no attempt to try to

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[1]The Sixth Circuit made no contrary finding. The Sixth Circuit found that two public safety agencies - the National Transportation Safety Board (NTSB) and the Federal Railroad Administration (FRA) - supported Dr. McLean's decision *after the fact*. (App. A, p. 9-10). In point of fact, there was no proof of this, other than Dr. McLean's testimony on the views of the NTSB and a letter from the FRA which did not even mention Xanax.

reassign Shiplett to a vacant position.[2] (App. A, p. 9, 20-21, App. E, p. 20-21).

Instead, Amtrak's Dr. McLean instructed Shiplett to stop taking Xanax immediately, if he wanted to return to work. Shiplett followed Dr. McLean's instruction and suffered physical injuries - headaches, shakiness, insomnia and nausea - as a result. (App. A, p. 4, 26). Amtrak's instruction was dangerously negligent and put Shiplett at risk of further physical injuries such as seizures. (App. E, p. 4-5).

Shiplett's treating physician Dr. Viken Matossian, a board certified psychiatrist who specialized in the effects of psychotropic medication such as Xanax, contacted Amtrak's Dr. McLean. Dr. Matossian advised Dr. McLean that Shiplett's taking Xanax as prescribed would not impair his ability to safely perform his job. (App. E, p. 2-4). Dr. McLean admitted Dr. Matossian advised him that Shiplett was able to safely perform his job as a locomotive engineer while taking Xanax before bedtime. (App. E, p. 17). Dr. McLean did not specialize in the area of psychiatry and had no special training on the effects of psychotropic medication such as Xanax. (App. E, p. 14-15).

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[2]More than six months after Shiplett made his accommodation request and only after he was totally disabled from returning to work in any capacity, Amtrak sent Shiplett a letter dated April 6, 1995, explaining the process of requesting a reasonable accommodation. Shiplett was unable at that point to return to work or respond to that letter. (App. A, p. 8-9).

Dr. McLean still refused to reinstate Shiplett to his position of locomotive engineer unless he stopped taking Xanax. After Shiplett requested reassignment to a conductor or assistant conductor position, Dr. McLean accused Shiplett of being a drug abuser, "mentally unstable" and recommended that he speak with a drug counselor. (App. A, p. 6, 17). Because of Amtrak's discriminatory conduct, Shiplett has been unable to return to work from December 23, 1994 forward.

Shiplett filed this lawsuit in U.S. District Court seeking remedy from Amtrak's discriminatory and negligent conduct. Shiplett maintained, in pertinent part, claims against Amtrak of handicap discrimination under Title I of the Americans With Disabilities Act (ADA), 42 U.S.C. §12102, *et seq.* and negligence under the Federal Employer's Liability Act (FELA), 45 U.S.C. §51. Shiplett maintained that Amtrak discriminated against him by refusing to return him to work and rejecting his request for reasonable accommodation on the basis of a perceived disability in violation of the ADA. Shiplett maintained under FELA that Amtrak negligently instructed him to stop taking Xanax immediately, thereby causing him physical and emotional injuries.

After an eight day trial, the jury returned a general verdict of $500,000.00 in favor of Shiplett. The district court denied Amtrak's motion for judgment as a matter of law or in the alternative a new trial. In a peremptory fashion, the Sixth Circuit vacated the judgment on jury verdict, reversed the district court's order denying Amtrak's motion for judgment as a matter of law and entered judgment in favor of Amtrak on each of Shiplett's claims.

While the Sixth Circuit found that Amtrak regarded

Shiplett as having a disability under the ADA, it deferred to Amtrak's judgment that Shiplett posed a direct threat to the safety of others because he took Xanax and was thus unqualified to perform the job of locomotive engineer. The Sixth Circuit did not review the objective reasonableness of Amtrak's judgment or address Amtrak's failure to make an individualized assessment before deciding that Shiplett posed a direct threat to the safety of others. Instead, the appellate court stated that it would defer to Amtrak's judgment and the views of public safety agencies because "courts have little expertise on this issue". (App. A, p. 20).

The appellate court was dismissive of Shiplett's request for a reasonable accommodation of reassignment to another position. The Sixth Circuit ruled that Shiplett did not meet his burden of showing the existence of any vacant positions for which he was qualified. There was no consideration given as to whether Amtrak made any efforts to assist Shiplett on his reasonable accommodation request. (App. A, p. 21-22). The court also rejected the FELA claim, holding that Shiplett's complained of physical injuries did not involve "traditional common law concepts of physical impact." (App. A, p. 26-27).

Shiplett then filed a petition for rehearing and suggestion for rehearing *en banc*. The Sixth Circuit denied the petition for rehearing. (App. B). Thus, this petition has now been filed.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT'S DECISION THAT PETITIONER POSED A DIRECT THREAT TO THE SAFETY OF OTHERS UNDER THE ADA DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *BRAGDON v. ABBOTT* THAT COURTS CANNOT DEFER TO THE JUDGMENTS OF HEALTH CARE PROFESSIONALS WITHOUT ASSESSING THE OBJECTIVE REASONABLENESS OF THE JUDGMENTS

A.

This Court's Decision in *Bragdon* Requires Lower Courts to Assess The Objective Reasonableness Of Health Care Professionals' Judgments Without Deferring To Their Individual Judgments.

This Court in *Bragdon v. Abbott*, 524 U.S. 624 (1998) set forth specific requirements for the lower courts to follow in assessing whether an individual with a disability under the ADA poses a direct threat to the safety of others.[3] The plaintiff in *Bragdon* was a dental patient infected with human immunodeficiency virus (HIV) who brought an ADA action

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[3]While *Bragdon* addressed the direct threat provision under Title III of the ADA, this Court held that "[p]arallel provisions appear in the employment provisions of Title I of the ADA, 42 U.S.C. §§12111(3), 12113(b)." *Bragdon, supra* at 648-649.

against her dentist Dr. Bragdon for refusing to treat her in his dental office. *Id.* at 629. Dr. Bragdon claimed that in his judgment, treating the plaintiff in his office posed a direct threat to the health and safety of others. The lower courts found that Bragdon raised no genuine issue of material fact to support the judgment that plaintiff's HIV infection posed a direct threat under the ADA. The trial court granted and the appellate court affirmed summary judgment in favor of the plaintiff. *Id.* at 629-630.

In reviewing what evidence supports a direct threat to the health or safety of others standard under the ADA, this Court first found the ADA requires that "a significant risk to the health or safety of others" must be shown. *Id.* at 648-649. This Court's decision in *Bragdon* established the following standard of review:

> "The existence, or non-existence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence." *Id.* at 649.
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> * * *
>
> "As a health care professional, [Bragdon] had the duty to assess the risk of infection based on the objective scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability." *Id.*

The *Bragdon* opinion specifies that Dr. Bragdon "receives no special deference simply because he is a health care professional." *Id.* This Court concluded that:

> "courts should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments." *Id.* at 650.

The *Bragdon* decision also sets forth explicit guidelines for the lower courts to follow in assessing the reasonableness of a health care professional's judgment on the issue of direct threat under the ADA. First, the views of public health authorities, while of special weight, are not conclusive. *Id.* at 650. Second, the lower court's assessment of the "available objective evidence" must only be based on evidence that existed at the time the defendant refused to treat the plaintiff. *Id.* at 650-651.

B.

The Sixth Circuit's Decision In The Case At Bar Directly Conflicts With This Court's Decision In *Bragdon*.

In the case at bar, the Sixth Circuit, after finding that Shiplett was regarded by Amtrak as having a disability covered by the ADA, committed palpable error in deferring to Amtrak's defense that Shiplett posed a direct threat to the safety of others. The Sixth Circuit held, in direct contradiction with *Bragdon*, as follows:

> "Given that the courts have little expertise on this issue, we conclude that the only

> reasonable course is to defer to the determination made by Amtrak and federal agencies charged with transportation safety that Shiplett's use of Xanax posed a significant risk to the safety of others." (App. A, p. 20).

The Sixth Circuit did not assess the available objective evidence, as required by *Bragdon*. The appellate court deferred to the medical views of Amtrak's medical officer, Dr. McLean. This Court's opinion in *Bragdon*, expressly precludes the lower court from engaging in such deference. The Sixth Circuit was required to assess the objective reasonableness of the medical evidence available at the time Dr. McLean decided that Shiplett's taking of Xanax posed a threat to the safety of others. *See Bragdon, supra* at 650.

The Sixth Circuit's decision to defer to the views of federal agencies also conflicts with this Court's holding in *Bragdon* that views of public health authorities are "not conclusive".[4] *Id.* at 650. The Sixth Circuit also violated the holding of this Court in *Bragdon* by relying on the views of federal agencies that were not available at the time Amtrak's Dr. McLean made the decision that Shiplett's use of Xanax posed a direct threat to the safety of others.

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[4]Four Justices of this Court give even less weight to views of public agencies in litigation between private parties. The dissent in *Bragdon* observed there is "no provision of law or judicial practice" that would permit courts to give scientific views more credence than others simply because they have been endorsed by a "politically appointed public health authority." *Bragdon*, 524 U.S. at 663 (REHNQUIST, C.J., concurring and dissenting in part).

The *Bragdon* opinion states that lower courts can only assess and place reliance on the available objective evidence at the time the complained of decision was made. *Id.* at 650-651, 653. In the case at bar, that would be the decision by Amtrak's Dr. McLean in September, 1994 to refuse to allow Shiplett to return to work so long as he was taking Xanax. (App. A, p. 4-6).

The views of the Federal Railroad Administration (FRA), which the Sixth Circuit relied upon, were not made known until December 30, 1994. (App. A., p. 9). This was well *after* Amtrak made its decision that Shiplett was a direct threat to the safety of others because of his use of Xanax. Similarly, the National Transportation Safety Board did not contact Amtrak about Shiplętt's use of Xanax until January 1995, well after Amtrak made its decision.

Accordingly and consistent with *Bragdon*, any views by these public agencies cannot be relied upon by the lower court in the case at bar. Most significantly, *Bragdon* preempted the Sixth Circuit from according any "special deference" to Dr. McLean's judgments. There were no federal regulations or published directives from any federal agency that required Amtrak to exclude Shiplett or any person from employment as a locomotive engineer solely because he was taking Xanax. Amtrak made this decision on its own. (App. E, p. 20).

The Sixth Circuit's decision is in irreconcilable conflict with *Bragdon*. The legitimacy of our federal judicial system is predicated on lower courts following decisions of this Court. To allow otherwise would invite chaos and cause ruin to the very fibre of our judicial system. This Court's

intervention is now urgently needed to protect the integrity of federal jurisprudence.

II

THE ADA PROHIBITS EMPLOYERS FROM IMPOSING REQUIREMENTS OF ITS OWN DEVISING EXCLUDING INDIVIDUALS FROM EMPLOYMENT IN SAFETY SENSITIVE POSITIONS SOLELY BECAUSE THEY TAKE CERTAIN PRESCRIPTION MEDICATION, WITHOUT CONDUCTING AN INDIVIDUALIZED ASSESSMENT ON WHETHER THE INDIVIDUAL POSES A DIRECT THREAT TO THE SAFETY OF OTHERS

Amtrak refused Kurt Shiplett reemployment as a locomotive engineer solely because he was taking the prescription medication Xanax. Amtrak claims it excluded all individuals who take Xanax under any circumstances from employment as locomotive engineers or any other safety sensitive positions, because Xanax "might" cause adverse side effects such as impairment of alertness or coordination.

It was undisputed Xanax affects individuals differently and Xanax can have no side effects on certain individuals. (App. E, p. 19). Amtrak did not know if Shiplett's use of Xanax impaired his alertness or coordination. Amtrak never individually assessed whether Shiplett's use of Xanax actually caused him any side effects which would pose a direct threat to the safety of others in the performance of his job as

locomotive engineer. (App. E, p. 12-14, 16-18).[5]

Amtrak cannot demonstrate that Shiplett posed a direct threat to the safety of others without conducting an individualized assessment of Shiplett's ability to safely perform the job function of locomotive engineer. This Court held in *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 (1987), that an "individualized inquiry" is necessary as to whether an employee posed a direct threat to the safety of others, in order to prevent handicap discrimination based on prejudice, stereotypes and generalized fears. This Court in *Arline* found that:

> "the fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases." *Id.* at 285.

While the *Arline* opinion addressed provisions of the Rehabilitation Act, Congress relied on the same statutory language in enacting the ADA. The ADA's direct threat provision codifies *Arline*. *See Bragdon v. Abbott*, 524 U.S. 624, 649 (1998). The employment provision of Title I of the ADA define a direct threat to mean a significant risk to the health and safety of others that cannot be eliminated by

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[5]Shiplett was regarded by Amtrak as having a disability under the ADA. (App. A, p. 15). Shiplett was therefore a "qualified individual with a disability" unless Amtrak proved its defense that Shiplett's taking Xanax posed a direct threat. *See*, 42 U.S.C. §§12102 (2)(c), §12111(8).

reasonable accommodation. 42 U.S.C. §12111(3). An employer can raise as a defense to a charge of handicap discrimination that an employee poses a direct threat to the safety of others. 42 U.S.C. §12113(a)(b).

The Equal Employment Opportunity Commission (EEOC) regulations implementing the provisions of the ADA, set forth that:

> "The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job." 29 C.F.R. §1630.2(r).

The legislative history to the ADA also supports the conclusion that there must be an individualized assessment. Congress stated in its Committee Report that decisions as to whether an individual poses a direct threat cannot be based on generalizations but must be based on "the facts of an individual case." The "direct threat" determination must be based on *"actual proof of significant risk to others"* and on *"objective evidence about the individual involved."* Congress noted that an employer may not refuse to hire an individual simply because he or she "sought treatment for a mental disorder." H.R. Rep. No. 101-485 (III), 101st. Cong. 2d Sess. 45-46 (1990) *reprinted* in 1990 U.S.C.C.A.N., pp. 468-469.

Just recently, this Court in *Sutton v. United Airlines, Inc.*, ____, U.S. ___, 119 S.Ct. 2139, 2147 (1999) emphasized, in the context of holding that a disability is determined with reference to corrective measures, that the

ADA mandated an "individualized inquiry". This Court in *Sutton* criticized the EEOC's directive that persons be judged in their uncorrected state, holding that:

> "[t]he agency approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition." *Id.* at 2147.

This Court held that an interpretation of the ADA which does not treat persons as "individuals" runs "contrary to both the letter and spirit of the ADA." *Id.*

This Court's analysis in *Sutton* applies with equal force to the "direct threat" standard of the ADA. There is no credible reason to require an "individualized inquiry" for determining whether an individual has a "disability" under the ADA *yet* not utilize the same standard in assessing whether an individual poses a direct threat to the safety of others.

Amtrak imposed a blanket exclusion not required by federal or state law which prohibited Shiplett and other individuals from employment opportunities in safety sensitive positions. This blanket exclusion runs directly contrary to the individualized analysis so central to the ADA.

The Sixth Circuit held that Shiplett was unqualified for safety sensitive positions solely based on his taking Xanax. (App. A, p. 19-20). The Sixth Circuit endorsed Amtrak's

blanket exclusion, devoid of any individualized inquiry. Amtrak's medical officer made it clear that irrespective of an individual's medical history, job performance, Xanax dosage or actual effect Xanax has on a particular individual, Amtrak excluded all individuals taking Xanax from working as locomotive engineers. (App. E, p. 12-13, 18-19).

To achieve the goals of the ADA, the law must recognize and accommodate the widespread and successful use of psychotropic medication in today's society. *See* Guiduli, The Threat To Safety Defense Standard And The Use Of Psychotropic Medication Under Title I Of The ADA, 144 U. Pa. L. Rev. 1149, 1181 (1996). The courts should not permit employers to utilize the direct threat provision of the ADA as a bulletproof shield to exclude all individuals taking prescription medication from employment opportunities in safety sensitive positions. Undoubtedly, this is a sensitive matter that needs to be put to rest by this Court.

III

THERE IS CONFLICT AND CONFUSION IN THE LOWER COURTS REGARDING AN EMPLOYEE'S BURDEN OF PROOF AND AN EMPLOYER'S AFFIRMATIVE DUTY UNDER THE REASONABLE ACCOMMODATION PROVISIONS OF THE ADA

There is a clear conflict among the Circuit Courts of Appeals regarding the employee's initial burden of proof on reasonable accommodation under the ADA and when that burden shifts to the employer to show that a reasonable effort to accommodate was made. In the case at bar, the Sixth Circuit imposed an unduly restrictive standard, requiring an

employee requesting reassignment to another position to establish as part of the initial burden of proof that there was a vacant position for which he or she was qualified. (App. A, p. 21-22). The Sixth Circuit's opinion followed its published precedent setting forth this standard. *Id. See, Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996); *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997).

The Sixth Circuit is not without company in imposing this restrictive standard. The 5th, 10th and 11th Circuits have held that an employee has the initial burden of identifying a vacant position for which he or she is qualified. Employers facing litigation in these circuits have no duty under the ADA to engage in an interactive process to assist an employee in identifying any vacant positions unless an employee first identifies a vacancy. *See, Willis v. Conopco, Inc.*, 108 F.3d 282, 285-286 (11th Cir. 1997); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 448 (11th Cir. 1996); *Taylor v. Principal Financial Group*, 93 F.3d 155, 165 (5th Cir. 1996); *White v. York International Corporation*, 45 F.3d 357, 362-363 (10th Cir. 1995).[6]

The 3rd, 7th and 8th Circuits have held that an employee requesting an accommodation of reassignment is not required to identify a vacant position as part of the initial burden of proof. These Circuit Courts have found that once an employee makes a request for reassignment, an employer

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[6]The 10th Circuit in a recent *en banc* decision has now noted that an interactive process is frequently an essential component of the statutory obligation to offer a reasonable accommodation. *See, Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172, fn. 10 (10th Cir. 1999).

has the burden of showing that it engaged in an interactive process and made reasonable efforts to assist in the search for appropriate reasonable accommodations. *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694-695 (7th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 632-634 (7th Cir. 1998); *Fjellestad v. Pizza Hut of America, Inc.*, 182 F.3d 609, 617 (8th Cir. 1999); *Taylor v. Phoenixville School District*, 174 F.3d 142, 157 (3rd Cir. 1999); *Mengine v. Runyon*, 114 F.3d 415, 420 (3rd Cir. 1997).

A request as straight forward as asking for continued employment is a sufficient request for accommodation to trigger the employer's duty under the ADA to engage in an interactive process. The ADA then places a duty on the employer to ascertain whether there is some job that the employee might be able to fill. *Hendricks-Robinson, supra, Miller v. Illinois Department of Corrections*, 107 F.3d 483, 486-487 (7th Cir. 1997).

In many cases, an employee will not have the ability or resources to identify a vacant position absent participation by the employer. *Mengine*, 114 F.3d at 420. The 10th Circuit in a recent *en banc* decision similarly found that once an employee asked the employer to return to work in some capacity, a genuine issue of material fact may be raised as to whether the employer engaged in reasonable accommodation under the ADA. *See, Smith v. Midland Brakes*, 180 F.3d 1154, 1173 (10th Cir. 1999). The 10th Circuit in *Smith* made the following observation:

> "The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time." *Id.*

The 9th Circuit has issued seemingly conflicting opinions on the issue of reasonable accommodation. In *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 749-750 (9th Cir. 1998), the Circuit Court followed the 6th and 11th Circuit line of cases that an ADA plaintiff has the initial burden of showing the existence of a vacant position that he or she could perform. Only then does the burden shift to the employer to make a reasonable effort at accommodation. *Id.* at 752-753. Yet only two weeks earlier, the 9th Circuit held that once an employee suggests an accommodation, the employer has a duty to make a reasonable effort to identify an accommodation. *See, Mustafa v. Clark County School District*, 157 F.3d 1169, 1176-1177 (9th Cir. 1998).

The 2nd Circuit has employed a slightly different standard in balancing the employee's initial burden of proof and the employer's duty to make a reasonable effort to identify an accommodation. The 2nd Circuit requires that the plaintiff must merely "suggest the existence of a particular plausible accommodation" which the defendant must then show is unreasonable. *Stone v. City of Mount Vernon*, 118 F.3d 92, 98 (2nd Cir. 1997).

The letter and spirit of the ADA strongly militate in favor of the approach taken by the 3rd, 7th and 8th Circuits. The ADA provides that no employer shall discriminate against a qualified individual with a disability by not making reasonable accommodations unless the employer can demonstrate the accommodation would impose an undue hardship. 42 U.S.C. §12112(b)(5)(A). The ADA defines "reasonable accommodation" to include reassignment to a vacant position for which the employee is qualified. 42 U.S.C. §12111(9)(B). An employer asserting the "direct threat"

defense of the ADA must show that the direct threat "cannot be eliminated by reasonable accommodation." 42 U.S.C. §§12111(3), 12113(b).

The legislative history to the ADA reflects Congress' intent that the employer and employee shall interact with one another to assess the availability of a reasonable accommodation. H.R. Rep. No. 101-485 (II), 101st Cong. 2nd Sess. 65-67 (1990), *reprinted* 1990 U.S.C.C.A.N. pp. 348-349. The EEOC regulations similarly recognize the need for the employer to initiate an informal interactive process with the employee to assess the availability of a reasonable accommodation. 29 C.F.R. §1630.2(o)(3).

There nevertheless is a deep split among the Circuit Courts of Appeals on an employee's initial burden of showing a reasonable accommodation and the employer's corresponding duty to show it made reasonable efforts to identify a reasonable accommodation. This tension is especially pronounced where the ADA plaintiff requests an accommodation of reassignment to another position, but is unable to identify a specific vacancy.

In the case at bar, the Sixth Circuit rejected Shiplett's claim of reasonable accommodation because he did not identify any vacant positions for which he was qualified. Even though Shiplett had requested to return to work in another position, the court did not place any burden on the employer to make reasonable efforts to assess the availability of a vacant position. The Sixth Circuit places an overly onerous burden on ADA plaintiffs, which is in tension with decisions of other Circuit Courts of Appeals.

This issue has been fully developed before the Circuit Courts of Appeals. The conflict among the circuits is confusing and chaotic for both employers and employees alike. Employees and employers in different regions of the country are subject to divergent protection and duties under the ADA. This Court's guidance in this area is urgently needed.

IV

THERE IS CONFUSION ON WHETHER THIS COURT'S OPINION IN *GOTTSHALL* PRECLUDES ALL NEGLIGENCE CLAIMS UNDER FELA FOR PHYSICAL AND EMOTIONAL INJURIES UNLESS THE EMPLOYEE SUSTAINS A PHYSICAL IMPACT BY A PHYSICAL OBJECT

Shiplett brought a claim under the Federal Employer's Liability Act (FELA), 45 U.S.C. §51 alleging that Amtrak negligently caused him physical and emotional injuries. At trial, Shiplett presented evidence that Amtrak negligently instructed him to stop taking Xanax immediately and he suffered physical injuries as a result. The physical impact, however, was not caused by any physical object.

The Sixth Circuit concluded that the physical injuries complained of by Shiplett did not constitute actionable injuries under FELA. The Sixth Circuit held, relying on its *en banc* decision in *Szymanski v. Columbia Transportation Co.*, 154 F.3d 591, 593 (6th Cir. 1998), that this Court's decision in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) did not permit a FELA recovery for Shiplett's physical injuries. The appellate court recited its position in *Szymanski* that *Gottshall* should be interpreted as "encompassing traditional

common law concepts of physical impact." (App. A, p. 26-27). This interpretation of *Gottshall* requires that an employee must show "actual impact by a physical object or being in the zone of danger for such an impact." *Szymanski*, 154 F.3d at 594.

The *Gottshall* opinion cannot be read that narrowly. This Court in *Gottshall* was concerned that recognition of a FELA cause of action for emotional injury, when not related to any physical trauma, may inundate judicial resources with a flood of trivial claims. *Gottshall*, 512 U.S. at 545. The *Gottshall* decision limited recovery for emotional injuries arising in the ordinary course of employment ("too much work") as distinguished from a situation in which a plaintiff was given "too dangerous" work. *Id.* at 558.

There is no mention in *Gottshall* that recovery for emotional distress caused by a railroad carrier's negligence is limited to instances where employees suffered physical impact by a physical object. Quite the contrary, this Court in *Gottshall* cited its prior decision rejecting the argument that FELA only covers injuries caused by accidents. *Id.* at 543, *citing Urie v. Thompson*, 337 U.S. 163, 181 (1949).

The Sixth Circuit has grossly misinterpreted this Court's decision in *Gottshall*, thereby severely and unduly restricting a railroad employee's rights to seek a remedy for negligent conduct in the workplace. This impacts an entire class of railroad workers as well as workers at sea. *See Szymanski*, 154 F.3d at 592 (applying the *Gottshall* decision to negligence claims under the Jones Act).

There was a sharp division in the Sixth Circuit

regarding the application and interpretation of *Gottshall*. The dissenting opinion to the *en banc* ruling in *Szymanski* correctly stated that *Gottshall* did not limit recovery for negligent infliction of physical injuries and only foreclosed negligent infliction of emotional distress claims "for too much work as opposed to too dangerous work." *Id.* at 598-599.

Other Circuit Courts have expressed uncertainty regarding the scope of this Court's opinion in *Gottshall*. The 3rd and 7th Circuits were unclear over whether *Gottshall* required a showing of a risk of physical harm **or** risk of physical impact in the absence of actual physical impact. *Bloom v. Consolidated Rail Corporation*, 41 F.3d 911, 914-915 (3rd Cir. 1994); *Marschand v. Norfolk and Western Railroad Co.*, 81 F.3d 714, 715 n.1 (7th Cir. 1996). The Third Circuit in *Bloom* expressed its hope that this Court will clarify these issues in its next FELA emotional distress case. *Id.* at 915.

In the case at bar, Shiplett suffered a physical impact - headaches, shakiness, insomnia and nausea- as a result of Amtrak's negligence. Shiplett also was in fear of physical harm-risk of seizures-as a result of Amtrak's negligent instruction to stop taking Xanax immediately. The negligent conduct Amtrak subjected Shiplett to falls within the rubric of "too dangerous" work.

The time is now ripe for this Court to review and clear up any confusion in the Circuit Courts surrounding its opinion in *Gottshall*. This petition presents the appropriate vehicle to resolve any such misconceptions. This Court's guidance is critical to preserve the humanitarian purpose of FELA tempered by the recognition that an employer should not be

made the insurer of every imagined trivial claim.

CONCLUSION

There are compelling reasons raised herein for this Court to exercise its jurisdiction and review the questions presented in this petition. These Federal law questions address important, real life employment concerns faced by employees and employers alike across the nation. This Court's guidance on these issues is critically needed. For all the foregoing reasons, Petitioner Kurt D. Shiplett respectfully prays that Certiorari be granted.

Respectfully submitted,

Jaimie R. Goodman
Law Offices of Jaimie R. Goodman

Counsel for Petitioner

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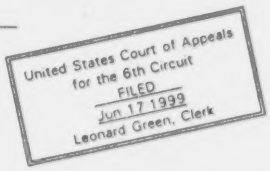
NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 97-2056

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



KURT D. SHIPLETT,
Plaintiff-Appellant,

v.

NATIONAL RAILROAD
PASSENGER CORPORATION,
D/B/A AMTRAK,
Defendants-Appellees.

ON APPEAL from the
United States District
Court for the Eastern
District of Michigan

Before: **KENNEDY**, **DAUGHTREY,** and **CLAY**;
Circuit Judge;
MARTHA C. DAUGHTREY, Circuit Judge.

After an eight-day trial, a jury returned a general verdict of $500,000 in favor of the plaintiff, Kurt Shiplett, based on his claims brought under the Americans with Disabilities Act, the Rehabilitation Act of 1973, the Michigan Handicappers' Civil Rights Act, and the Federal Employer's Liability Act (FELA). The defendant, National Railroad Passenger Corporation (Amtrak), appeals the district court's denial of its motion for judgment as a matter

of law (or, in the alternative, a new trial) and the court's entry of judgment on the jury verdict. For the reasons which follow, we conclude that the district court erred in denying Amtrak's motion, and we therefore vacate the judgment entered below and enter judgment in favor of defendant Amtrak.

PROCEDURAL AND FACTUAL BACKGROUND

Kurt Shiplett began his employment with Amtrak in September 1986. In 1990, he was promoted to the position of locomotive engineer. On September 15, 1994, while working as the locomotive engineer on a passenger train, he overshot the stopping point on the passenger platforms at three different stations. The first two times, he missed the platform by one to one and one-half car lengths, which the plaintiff and other Amtrak employees attributed to mechanical problems. Shortly after noon, however, Shiplett overran the third stop, in Jackson, Michigan, by the entire length of the train, which consisted of seven cars plus the locomotive. Although the plaintiff continued to operate the train without incident to its destination, his supervisor was later disciplined for allowing him to continue after the Jackson incident. The supervisor later testified that Shiplett said that he was tired and had made a mistake in judgment. At the time of this incident, the plaintiff was working as an "extra-board engineer," which meant that he was on-call for duty, and therefore subject to federal regulations and collective bargaining

agreement requirements regarding the amount of time an engineer must e given to rest between assignments. Accordingly, Shiplett had been off duty at least 24 hours before his shift began on September 15.

In overshooting the passenger platform, Shiplett violated Amtrak's operating rules, and was therefore required to submit to a "reasonable suspicion" drug and alcohol screen, in accordance with Amtrak policy. He tested positive for benzodiazepine, a class of drugs that includes Xanax, a drug that Shiplett had been taking ostensibly to alleviate a sleep disorder. However, Xanax is a highly addictive drug, usually prescribed for the treatment of anxiety and panic attacks, which, as it turned out, Shiplett was also experiencing. Its potential side effects include drowsiness, memory impairment, light-headedness, and impaired coordination. Dr. Robert McLean, Amtrak's medical advisor, testified that the average duration of side effects from Xanax is approximately 11.5 hours, but that the effects can last for up to 26 hours after ingestion. However, Dr. McLean also admitted that Xanax can have no side effects on some individuals.

Shiplett maintained that he had been prescribed Xanax in 1992, at a dosage of .25 milligram at bedtime. He had reported this prescription on a 1992 employee form that his supervisor saw, but which was not sent to Dr. McLean's office. Another medical report resulting from an Amtrak physical examination indicated that he was taking Xanax as early as 1991 and had been

advised by a Dr. Massan at that time that he was "not allowed to operate motorized vehicle" while taking Xanax. By 1994, he had nevertheless increased his daily dosage from .25 to 1.0 milligram of Xanax, a four-fold increase.

Shiplett was removed from service the same day as the overshooting incidents, which were reported the following day to Dr. McLean. McLean was required to determine whether the Xanax was in Shiplett's system "legitimately" and also to determine whether the drug might have c^Aused Shiplett to miss three station stops on September 15. He testified that when he spoke with Shiplett on September 19, Shiplett told him that he had felt extremely drowsy on September 15 and that he did not recall overshooting the train stations. During that conversation, Shiplett also informed Dr. McLean that during his last physical examination, conducted on September 23, 1992, he had indicated that he was taking Xanax on Amtrak's medical examination form and had so advised the Amtrak physician. Shiplett testified that Dr. McLean told him, around September 20, that if he wanted to return to work, he had to stop taking Xanax immediately. He further testified that he followed that advice and suffered headaches, shakiness, insomnia, and nausea as a result. Dr. McLean disputed this version of events at trial, testifying that he advised Shiplett to contact his personal physician immediately so that he could be supervised in withdrawing slowly from the drug over a two to three week period.

Shiplett maintained at trial that an unidentified Amtrak physician had told him that he could take Xanax at bedtime without impairing his work as a locomotive engineer the following day. He also testified that he had verbally informed one or more of his supervisors that he was taking Xanax and that they authorized him to continue taking the medication, "as long as it had been prescribed by a doctor." However, Dr. Gallant, a physician who saw the plaintiff on September 27, less than two weeks after the overshoot incident, advised Shiplett "that he [should] refrain from ever taking this medication" and told Shiplett that he should "talk to Dr. McLean about getting off the Xanax slowly rather than suddenly stopping using it."

McLean testified that the medical director's office did not have copies of any of Shiplett's physical examinations at the time of the incidents that led to Shiplett's suspension, that he was unaware that Shiplett was taking Xanax, and that he would not have authorized him to use the drug.

After telephoning the plaintiff's personal physician, Dr. May, to confirm that he had prescribed Xanax to Shiplett, Dr. McLean determined that the Xanax found in Shiplett's system was there "legitimately" and therefore treated the September 15 drug test as a negative result. As a result, Shiplett was not required to give a clean urine sample within 30 days or to enter an employee assistance program, as usually required under company

policy after a negative drug test result. However, Dr. McLean concluded that the Xanax might have contributed to Shiplett's "significant operational error" and, on September 22, 1994, he temporarily disqualified the plaintiff from working as a locomotive engineer until he discontinued the use of Xanax.

After receiving Dr. Gallant's report on his September 27 fitness-for-duty examination of Shiplett, Dr. McLean formally reinstated the plaintiff to his position as locomotive engineer on the condition that he not take Xanax or medication with similar side effects and that he report to his supervisor whenever he felt too drowsy to work. Shiplett testified, however, that when he spoke with Dr. McLean after Dr. Gallant's examination to clarify whether he should gradually discontinue the Xanax and to ask whether he could work as a conductor or an assistant conductor, Dr. McLean accused him of being a drug abuser and recommended that he speak with a drug counselor. McLean denied that this conversation ever took place.

On November 11, 1994, Shiplett's psychiatrist, Dr. Matossian, provided a written report to Dr. McLean stating that he was treating the plaintiff for panic attacks and depression and indicating the medications the plaintiff was taking, which did not include Xanax. The letter further stated that the plaintiff was fit to resume all of his previous work activities. In response, Dr. McLean determined that Shiplett could return to work without restrictions. On November 23, 1994, the plaintiff submitted

to a return-to-work physical in accordance with the terms of the governing collective bargaining agreement between Amtrak and the Brotherhood of Locomotive Engineers. Shiplett's urine tested positive for Xanax. His explanation was that he had forgotten his new medications while on vacation and therefore, three days before the test, had taken some Xanax that he had with him.

Because the drug test was positive, under Amtrak's policy and the terms of the collective bargaining agreement, Shiplett was required to meet one of two requirements before returning to work: (1) provide a negative urine sample within 30 days of the positive result; or (2) enter Amtrak's Employee Assistance Program within 30 days. Amtrak informed the plaintiff of these options by letter dated November 29, 1994. Dr. McLean also called Dr. Matossian in early December to discuss the plaintiff's options. Shiplett did not respond to the drug notification letter.

On December 23, 1994, Dr. Matossian sent Amtrak a letter stating that Shiplett would be "off work indefinitely." On January 5, 1995, Amtrak sent the plaintiff a formal notice that it had begun an investigation and had scheduled a hearing regarding his violation of Amtrak rules in failing to respond to the November 29 drug notification letter, in accordance with the company's labor agreements. At some point in January, the plaintiff was hospitalized for eight days for mental health reasons. On January 26, 1995, Dr. McLean sent the plaintiff and Dr. Matossian a letter

informing them that the hearing would be indefinitely postponed and that he had arranged for a waiver of Amtrak's drug policy to allow Shiplett to obtain treatment from Dr. Matossian instead of being treated in the company's Employee Assistance Program. Shiplett did not take any action in response or compliance with the suggestions of that letter.

In early 1995, Shiplett's wife completed an application on his behalf for disability benefits from the Railroad Retirement Board. The application, which was signed by the plaintiff's father on his behalf and submitted along with a report from Dr. Matossian, represented that between May 1991 and September 1994, the plaintiff had suffered from "fatigue, confused [sic], insomnia, fear of losing control of oneself/crazy, lack of concentration, panic attacks." The application acknowledged that Amtrak had not medically disqualified Shiplett from working, but stated that he had been unable to work since September 15, 1994, because of his condition. The Railroad Retirement Board awarded him monthly benefits, and Amtrak transferred him to a disability retirement status, both effective as of September 15, 1994.

On April 6, 1995, Amtrak sent Shiplett a letter explaining the process of requesting a reasonable accommodation, specifically detailing the necessity for documentation of his disability prepared by his physician along with specifications regarding restrictions or limitations on his activities. Shiplett did not respond to that letter and

later testified that he was unable at that point to return to work or respond to the letter. Dr. McLean spoke to the plaintiff again on July 11, 1995, at which time the plaintiff stated that he was only interested in the position of locomotive engineer and that he would "drop his discrimination charges against Amtrak if it would drop the charges against him." Shiplett claimed that he orally asked Dr. McLean towards the end of the September 1994 whether he could work as a conductor or assistant conductor. Dr. McLean had no recollection of that conversation.

Two federal agencies were also involved in Shiplett's situation. Dr. McLean had previously testified before the National Transportation Safety Board, after a serious accident in late 1992, that Amtrak did not allow engineers to operate trains while taking Xanax. The Board later made a specific recommendation that Amtrak develop programs to ensure that engineers would not take drugs such as benzodiazepines and barbiturates. Upon being contacted by Shiplett, who was asking about the permissibility of using Xanax, the senior toxicologist at the Board called Dr. McLean to reiterate the Board's position that Amtrak should not permit engineers to use Xanax because the side effects could last 10-14 hours. The Federal Railway Administration also investigated the Shiplett matter in response to a Congressional request. On December 30, 1994, the Administration issued a letter concluding that Dr. McLean's actions were consistent with

49 C.F.R. Part 219.103, which "requires medical officers to ensure that medications used by employees are consistent with the safe performance of the employee's duties."

On February 20, 1995, the plaintiff filed a claim of disability discrimination with the EEOC. When the EEOC found no reasonable basis to support it and issued a right-to-sue letter, Shiplett then field this action against Amtrak, alleging that Amtrak had discriminated against him on the basis of a disability or perceived disability, in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., the Rehabilitation Act of 1973, 29 U.S.C. §§ 794, et seq., and the Michigan Handicappers' Civil Rights Act, Mich. Comp. Laws Ann. §§ 37.1101, et seq.[1] He also alleged that Amtrak had discriminated against him in retaliation for his allegations of discrimination, in violation of § 602(a) of the Michigan Handicappers' Civil Rights Act. His third claim alleged that Amtrak negligently caused him physical and emotional injuries, thereby violating the FELA, 45 U.S.C. §§ 51 et seq.

In addition to the evidence discussed above, Shiplett also presented evidence that he sustained losses of $60,000 per year in lost wages, which totaled $180,000 at the time of trial. He calculated future lost wages at $1.5

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[1]In 1998, after the plaintiff filed this action, the Michigan state legislature changed the name of this statute to "Persons with Disabilities Civil Rights Act."

million and lost benefits as $166,000. Amtrak did not present evidence on economic damages. At the close of the plaintiff's case, Amtrak moved for judgment as a matter of law on all claims. The district court denied that motion. Following a charge conference that was not transcribed, the trial judge instructed the jury. In doing so, he declined to give five instructions requested by Amtrak and also declined to use special verdict forms that had been submitted both parties, relying instead on a general verdict form that did not separately reference the plaintiff's individual claims. The jury returned a general verdict in favor of the plaintiff and awarded damages of $500,000. Amtrak made a timely post-trial motion on judgment as a matter of law, or in the alternative, a new trial, which the district court denied. This appeal followed.

DISCUSSION

Disability Discrimination Claim

Amtrak contends that the district court erred in denying its motion for judgment as a matter of law on the plaintiff's disability discrimination claims, retaliation claim, and FELA claim. We review de novo the disposition of a motion for judgment as a matter of law. See Snyder v. AG Trucking, Inc., 57 F.3d 484, 490 (6th Cir. 1995). Such a judgment may be rendered only when no reasonable juror could find in favor of the non-moving party. See id. In reviewing a Rule 50(b) motion, therefore, we do not

weigh the evidence, evaluate the credibility of the witnesses, or substitute our judgment for that of the jury. See K&T Enters, Inc. vs. Zurich Ins. Co., 97 F.3d 171, 175-76 (6th Cir. 1996). Instead, we are required to view the evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences. See id. at 176. We will reverse a district court's denial of such a motion only if reasonable minds could not come to a conclusion other than one in favor of the movant. See id.

The plaintiff's disability discrimination claim is brought under the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq., the Rehabilitation Act of 1973, 29 U.S.C. §§ 794, et seq., and the statute then known as the Michigan Handicappers' Civil Rights Act, Mich. Comp. Laws Ann. §§ 37.1101, et seq. By statute, the standards governing ADA cases also apply to Rehabilitation Act cases alleging employment discrimination. See McPherson v. Michigan High Sch. Athletic Ass'n., Inc., 119 F.3d 453, 460 (6th Cir. 1997) (en banc)(explaining that principle distinction between the two statutes is that coverage under the Rehabilitation Act is limited to entities receiving federal financial assistance, while ADA's reach extends to purely private entities); Burns v. City of Columbus, 91 F.3d 836, 842 (6th Cir. 1996)(citing 29 U.S.C. § 794(d)). Similarly, resolution of the federal disability claims generally will also resolve claims raised under the Michigan statute, which essentially tracks federal law. See Cassidy v. Detroit Edison Company, 138 F.3d 629, 634 n.3 (6th Cir.

1998)(citing Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1178 n.3 (6th Cir. 1996), and Ashworth v. Jefferson Screw Products, Inc., 440 N.W.2d 101, 104-05 (Mich. Ct. App. 1989)).

> The ADA mandates in relevant part that: No covered entity s hall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a)(1994). Under the ADA and the Rehabilitation Act, a plaintiff may prove that he was discriminated against based upon his disability either through direct evidence or indirect evidence. See Monette, 90 F.3d at 1178. The latter method involves the burden-shifting approach first articulated in McDonnel Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Because Shiplett has presented no direct evidence that he was discriminated against because of a disability or a perceived disability, he can rely only on indirect evidence.

To recover on a claim of discrimination brought under the ADA or the Rehabilitation Act using indirect evidence, an employee must first make out a *prima facie* case of discrimination by establishing that (1) he was or was perceived to be handicapped within the definitions

of each of the acts; (2) he was otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation; (3) he suffered an adverse employment decision; (4) the employer knew or had reason to know of the plaintiff's disability; and (5) the employer replaced him. See Monette, 90 F.3d at 1186. Under the Rehabilitation Act, the plaintiff must also show that Amtrak receives federal funds. See id. at 1178 n.4.

If the plaintiff successfully establishes a *prima facie* case, that creates a mandatory presumption of discrimination and the burden shifts to the employer to proffer a legitimate, non-discriminatory reason for discharging the employee. See Smith v. Chrysler Corp., 155 F.3d 7799, 805 (6th Cir. 1998). If the defendant shows a non-discriminatory reason, the mandatory presumption becomes a permissive inference, and the burden shifts back to the plaintiff to show by a preponderance of the evidence that the employer's proffered reason for discharge was actually a pretext intended to hide unlawful discrimination. See id.

On appeal, Amtrak disputes that Shiplett has met his burden with respect to the first two elements of his *prima facie* case. In order to recover on his disability discrimination claim, Shiplett must first establish as part of his *prima facie* case that he was or was perceived to be handicapped within the definitions of each of the acts, at the time of Amtrak's allegedly discriminatory act. An employee can prove he has a disability by showing he has

a physical or mental impairment that substantially limits one or more major life activities, that he had a record of such an impairment, or that he was perceived as having such an impairment. 42 U.S.C. § 12102(2).

Shiplett's complaint alleged that Amtrak discriminated against him because the company regarded him as having a disability *or* because he had a disability. However, at trial Shiplett maintained that he was not disabled from September 15, 1994, through mid-December 1994, but that Amtrak regarded him as having a disability during that time.

The applicable regulations provide three ways in which a plaintiff can show that he is "regarded" as having a disability:

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer ... as constituting a substantially limiting impairment;
>
> (2) the individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or
>
> (3) the individual may have no impairment at all but is regarded by the employer ... as having a substantially limiting impairment.

29 C.F.R. App. § 1630.2(I). As we have previously explained, to prevail on a "regarded as" disabled discrimination claim, a "plaintiff must show that the perceived impairment is a substantial limitation on a major

life activity." Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 885 (6th Cir. 1996). The term "substantially limits' means an inability to perform or a significant restriction on the ability to perform as compared to the average person in the general population." Cassidy v. Detroit Edison Co., 138 F.3d 629, 633 (6th Cir. 1998)(citing 29 C.F.R. § 1630.2(j)(1)). "'Major life activities' include 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" Id. (quoting 29 C.F.R. § 1630.2(i)).

Shiplett argues that the evidence was sufficient for a reasonable jury to find that the defendant regarded or "perceived" him as having a substantially limiting disability -- specifically drug addiction and mental illness. The ADA provides protection for employees who are erroneously regarded as being current illegal drug users. See 42 U.S.C. § 12114(b)(3)(excluding erroneous perception of illegal drug use from being disallowed as a disability under § 12114(a)); Buckley v. Consol. Edison Co. of New York, Inc., 127 F.3d 270, 273 (2d Cir. 1997)(stating that committee reports in the ADA's legislative history make clear that "'[i]n removing protection for persons who currently use illegal drugs, the Committee does not intend to affect coverage for individuals who have a past drug problem or are erroneously perceived as having a current drug problem'")(quoting H.R. Rep. No. 101-485(II), at 77 (1990)), vacated en banc on other grounds,

155 F.3d 150 (2d Cir. 1998); Collings v. Longview Fibre Co., 63 F.3d 828, 831-32 (9th Cir. 1995)(stating that the ADA protects "individuals who are erroneously regarded as using drugs when in fact they are not")(citing § 12114(b)). Although Shiplett presented evidence at trial that Dr. McLean made statements indicating his perception that Shiplett was "mentally unstable" and addicted to the prescription drug Xanax, he was also required to show that Amtrak believed that the perceived mental instability and drug addiction were severe enough to substantially limit one or more of his major life activities. Shiplett has not explicitly stated what major life activities Amtrak regarded as substantially limited by these perceived impairments, although his contention seems to be that Amtrak regarded his ability to perform his duties as an engineer, and perhaps a conductor, a position that he testified that he requested as an accommodation, as being substantially limited.

Several circuits have held that "an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job." Byrne v. Board of Education, 979 F.2d 560, 567 (7th Cir. 1992)(quoting Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986)), cited with approval in Kocsis, 97 F.3d at 885. Indeed, the applicable regulations provide that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major activity of working." 29 C.F.R. § 1630.2(j)(3)(i); see also Sutton v.

United Air Lines, Inc., 130 F.3d 893, 904 (10th Cir. 1997)(citing 29 C.F.R. § 1630.2(j)(3)(i)), cert. granted, 119 S.Ct. 790 (1999). Rather, in order to establish a disability under the "regarded as" prong of the ADA with respect to the major life activity of working, the plaintiff must show that his employer regarded him as having an impairment that creates a "significant[] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i); see also Sutton, 130 F.3d at 904 (quoting 29 C.F.R. § 1630.(2)(j)(3)(i)); Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir. 1994)(same). A "class of jobs" is defined as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(B); see also Sutton, 130 F.3d at 904 (quoting 29 C.F.R. § 1630.2(j)(3)(ii)(B)). Applying this law to Shiplett's case and drawing all reasonable inferences in his favor, we conclude that he has established that Amtrak regarded him as having a disability that substantially limited the major life activity of work, because the evidence suggests that McLean thought he was substantially limited in his ability to perform any of a broad range of safety-sensitive jobs.

Thus, we must consider whether Shiplett established that he was "otherwise qualified" to perform the essential functions of the locomotive engineering job, in satisfaction of the second element of his *prima facie* case. A "qualified individual with a disability" within the meaning of §12112(a) is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). "A disabled individual, however, is not 'qualified' for a specific employment position if he or she poses a 'direct threat' to the health or safety of others which cannot be eliminated by a reasonable accommodation." Mauro v. Borgess Medical Center, 137 F.3d 398, 402 (6th Cir. 1998)(citing 42 U.S.C. § 12111(3) and Doe v. University of Maryland Medical System Corp., 50 F.3d 1261, 1265 (4th Cir. 1995)). Furthermore, the "direct threat" standard applied in the Americans With Disabilities Act is based on the same standard as 'significant risk' applied by the Rehabilitation Act." Id. (citing H.R. Rep.No. 101-485, pt. 3 at 45 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 468; University of Md., 50 F.3d at 1265 N.9; and Doe v. District of Columbia, 796 F.Supp. 559, 567 n. 11 (D.D.C. 1992)).

Therefore, the analysis under each statute requires consideration of whether Shiplett's working as a locomotive engineer while regularly using Xanax created a direct threat or significant risk to the health or safely of

others. Dr. McLean, the National Transportation Safety Board, and the Federal Railway Administration all believe that the potential side effects caused by the use of Xanax pose too significant of a risk to the safety of the operation of a train to justify its use. Given that the courts have little expertise on this issue, we conclude that the only reasonable course is to defer to the determination made by Amtrak and federal agencies charged with transportation safety that Shiplett's use of Xanax posed a significant risk to the safety of others.

It follows that the plaintiff, as a non-qualified individual, could not perform an essential function of his job, namely, operating a train safely, without accommodation. But it also appears that his employer could not "reasonably accommodate" the plaintiff to enable him to perform "the essential functions" of the job in question. School Bd. of Nassau County v. Arline, 480 U.S. 287-88 n. 17 (1987)(quoting 45 C.F.R. § 84.3(k)(1985)); accord Doe v. DeKalb County School District, 145 F.3d 1441, 1446 (11th Cir. 1998). Shiplett has not suggested, nor can we think of, any reasonable accommodation could be made that would qualify him to perform his duties as a locomotive engineer in spite of the possibility of drowsiness and other potential adverse side effects that accompany the use of Xanax. He merely argues that it was unreasonable for Amtrak to refuse to allow him to work while taking Xanax. His only suggested accommodation was to request placement as a conductor. Although Amtrak does not recall

or have record of that request, it argues now it would have precluded Shiplett from that position as well, because it was also a safety-sensitive position. Shiplett himself testified that the job of conductor required supervision over the coaches, including, in the case of an emergency, evacuating the passengers. Accordingly, we conclude that the plaintiff cannot prevail on his discrimination claim as a matter of law, because he failed to show that he can perform the essential functions of his job with or without accommodation.

Furthermore, Shiplett bears the initial burden of establishing that the accommodation he sought was "objectively reasonable," which includes showing that there was an open conductor position. Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1183 (6th Cir. 1996); see also Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997). "In some cases, reasonable accommodation under the ADA may include 'job restructuring' or 'reassignment to a vacant position.'" Smith, 129 F.3d at 867 (citing 42 U.S.C. § 12111(9)(b) and 29 C.F.R. §1630.2(o)(2)(ii)). Nonetheless, "the ADA does not require an employer to reassign an employee to a position that is not vacant." Id. (citing White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995)). Nor does the ADA require that an employer restructure the company to create a position for an employee "in a manner which would usurp the legitimate rights of other employees in a collective bargaining agreement." Jasany v. United States Postal Service, 755

F.2d 1244, 1251-52 (6th Cir. 1985). Shiplett did not present evidence on any of these issues. Thus, without evidence that there was an opening for a conductor, the plaintiff's requested accommodation, if it could be proven, would not be objectively reasonable. See Smith, 129 F3d at 867.

In sum, Amtrak's only condition upon Shiplett's working as a locomotive engineer was that he not use Xanax. Shiplett told the company that he would comply with the directive and obtained prescriptions with a different drug to treat his sleeping problems, yet tested positive for Xanax on his return-to-work drug test. After that, he could have returned to work simply by providing a urine sample that tested negative for Xanax, but he did not do so. Indeed, at no time did Shiplett present a urine sample showing that he was not using Xanax. Accordingly, he was not "otherwise qualified" for the locomotive engineering position which he had previously held.[2] Furthermore, Shiplett did not meet his burden of showing that his suggested accommodation of being placed as a conductor was objectively reasonable. We therefore

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[2]Even if we were to conclude that Shiplett was "otherwise qualified" for the position at issue despite his use of Xanax, his continued use of the drug constitutes a legitimate non-discriminatory reason for Amtrak's decision to temporarily preclude him from working in this position. There is no evidence that this proffered reason is pretextual.

conclude that Shiplett was not otherwise qualified for the position at issue.

B. Retaliation Claim

Shiplett's retaliatory discrimination claim is brought under § 602(a) of the Michigan Handicappers' Civil Rights Act, Mich. Comp. Laws Ann. §§ 37.1101 et seq. (West 1985). Section 602(a) provides as follows: "A person or 2 or more persons shall not: (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person had made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." Mich. Comp. Laws Ann. § 37.1602(a) (West 1985). This language tracks the language used in the ADA. Thus, cases discussing the standards for an ADA retaliation claim are also applicable to a retaliation claim under the Michigan statute. See Monette, 90 F.3d at 1178 n.3.

A plaintiff makes a *prima facie* case of retaliation under the ADA and, thus, the parallel Michigan Act, by showing that: (1) he engaged in protected activity; (2) the exercise of his civil rights was known by the defendant; (3) that defendant thereafter took adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Walborn v. Erie County Care Facility, 150 F.3d 584, 588-89 (6th Cir. 1998).

Amtrak contends, correctly we conclude, that Shiplett has not shown that he was subjected to any adverse employment action. Shiplett testified that he first made complaints of discrimination against Amtrak around late November or early December of 1994. Dr. McLean had cleared the plaintiff to return to his position as locomotive engineer in mid-November 1994, and Shiplett was merely required to submit to a return-to-work physical, which was required by the terms of the governing collective bargaining agreement between Amtrak and the Brotherhood of Locomotive Engineers, in order to return to work. On November 23, 1994, the plaintiff was given such a physical and again tested positive for Xanax. He was therefore not allowed to return to work. Shiplett needed only to submit a clean urine sample within 30 days of that positive drug test to regain his position as locomotive engineer. He failed to do so. From the time of the September 15 overshooting incidents, Amtrak's only condition on Shiplett's return to work was that he discontinue using Xanax for safety reasons. This was merely a condition for working in that safety-sensitive position, and not an adverse employment action.

Despite the fact that the result of Amtrak's condition was that the plaintiff did not work for an extended period of time and, accordingly, did not receive wages, that outcome was the result of his own behavior. Employers in a variety of industries that involve safety-sensitive positions require, implicitly or explicitly, that

workers arrive for work every day unimpaired by any substances that may affect their ability to perform their jobs safely. This requirement does not constitute an adverse employment action.

It follows that the plaintiff's retaliation claim also fails sa a matter of law.

C. FELA Claim

Shiplett also brings a negligence claim under the FELA, alleging that Amtrak negligently caused him physical and emotional injuries. The Supreme Court recently clarified the standard for recovering for negligent infliction of emotional distress under the FELA in Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994). In Gottshall, the Court considered two claims for negligent infliction of emotional distress. First, it considered the claim of Carlisle, a plaintiff who had worked for the railroad as a train dispatcher for several years before suffering a nervous breakdown and other injuries due to overwork. See id. at 539-40. Second, the Court considered Gottshall's claim that the railroad was responsible for the major depression and post-traumatic stress disorder he suffered after witnessing a co-worker have a heart attack and die while working. See id. at 536-37. As we have previously noted, "the Gottshall Court adopted the common law 'zone of danger' test to determine who may recover for negligent infliction of emotional distress under the FELA.

The zone of danger test limits recovery for emotional injury to those plaintiffs who sustain physical impact as a result of a defendant's negligent conduct or who are placed in immediate risk of physical harm by that conduct. Id." Szymanski v. Columbia Transportation Co., 154 F.3d 591, 593 (6th Cir. 1998)(en banc)(citation to Gottshall, 512 U.S. at 554-57, omitted). In Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997), "the Supreme Court emphasized its adherence to the Gottshall holding in reiterating the reasons 'common law courts have restricted recovery for emotional harm to cases falling within rather narrowly defined categories...." Szymanski, 154 F.3d at 594 (quoting Metro-North, 521 U.S. at 433).

The plaintiff argues in his appellate brief that he introduced the following evidence at trial supporting several grounds of liability under the FELA: (1) he followed Dr. McLean's instructions to stop taking Xanax immediately, and suffered physical injuries as a result; and (2) Amtrak refused to return Shiplett to work without examining him to see whether Xanax impaired his ability to perform his job responsibilities, which caused him physical injuries. During trial, the plaintiff also argued that Amtrak's negligence was responsible for his emotional breakdown. In Metro-North, the Supreme Court listed examples of cases cited in Gottshall in support of its narrow "zone of danger" test. See Metro-North, 521 U.S. at 430-31. It is clear that those cases all envision an actual, immediate "physical impact," such as a car accident. In

Szymanski, we reviewed cases in which courts rejected claims under the FELA for work-induced physical injuries such as depression, headaches, and weight loss, as well as intangible workplace physical threats such as carcinogenic substances, and concluded that a work-induced heart attack did not create liability under the FELA. Szymanski, 154 F.3d at 594-95. The Szymanski court took the position that those cases reinforced its interpretation of Gottshall as encompassing traditional common law concepts of physical impact. See id. In light of the governing case law, we can only conclude that the injuries of which Shiplett complains do not constitute actionable injuries under the FELA.

CONCLUSION

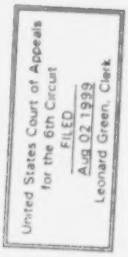
For the foregoing reasons, we REVERSE the district court's order denying defendant's motion for judgment as a matter of law and, accordingly, enter judgment for Amtrak on each of the plaintiff's claims.

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KURT D. SHIPLETT,
Plaintiff-Appellee,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,
Defendant-Appellant.



BEFORE: KENNEDY, DAUGHTREY, and **CLAY,**
Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KURT D. SHIPLETT,
Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,
Defendant.
----------/

Case No. 96-71467
Hon.: Horace W. Gilmore

JAIMIE R. GOODMAN (P34769)
Attorney for Plaintiff
The Ford Building
615 Griswold, Suite 1805
Detroit, Michigan 48226
(313) 965-5123

Eastern Dist. of MI
Filed 9/24/97

Cathleen Giannetta, Esq.
Attorney for Defendant
National Railroad Passenger
Corporation ("Amtrak")
233 Broadway, 34th Floor
New York, N.Y. 10279

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JUDGMENT ON JURY VERDICT

At a session of said Court held
in the U.S. Courthouse in Detroit,
Michigan on September 24, 1997

Present: Honorable Horace W. Gilmore
District Court Judge

This action came on for trial before the Court upon a jury trial, the issues having been duly tried and the jury having duly rendered its verdict on July 23, 1997:

IT IS HEREBY ORDERED AND ADJUDGED, that Judgment is hereby entered in favor of Plaintiff Kurt D. Shiplett and Plaintiff shall recover from Defendant, the sum of Five Hundred Thousand Dollars ($500,000.00) along with interest thereon and taxable costs as allowed by law.

Horace W. Gilmore
District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KURT D. SHIPLETT,
Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,
Defendant.
----------/

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Attorney for Plaintiff
The Ford Building
615 Griswold, Suite 1805
Detroit, Michigan 48226
(313) 965-5123

Cathleen Giannetta, Esq.
Attorney for Defendant
National Railroad Passenger
Corporation ("Amtrak")
233 Broadway, 34th Floor
New York, N.Y. 10279
----------/

Eastern Dist. of MI
Filed 9/24/97

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE A NEW TRIAL

At a session of said Court held
in the U.S. Courthouse in Detroit,
Michigan on September 24, 1997

Present: Honorable Horace W. Gilmore
District Court Judge

The matter having come on for hearing on September 24, 1997 on Defendant's Motion for Judgment As a Matter of Law Or In the Alternative, A New Trial, the Court have considered the briefs, heard oral argument and being otherwise fully advised in the premises;

IT IS HEREBY ORDERED, for the reasons set forth on the record, that Defendant's Motion for Judgment As a Matter of Law is DENIED and that Defendant's Motion for a New Trial is DENIED.

Horace W. Gilmore
District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KURT D. SHIPLETT,
Plaintiff-Appellee,

Case No. 96-71467

v.

Hon.: Horace W. Gilmore

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,
Defendant-Appellant.

VOLUME 3

TRIAL

Proceedings had and testimony taken in the above-entitled matter before HONORABLE HORACE W. GILMORE, District Judge, United States District Court, Detroit, Michigan, on Thursday, July 10th, 1997.

APPEARANCES:

FOR THE PLAINTIFF: Jaimie R. Goodman, Esq.
FOR THE DEFENDANT: Cathleen Giannetta, Esq.

COURT REPORTER: Joan L. Morgan, CSR
Official Court Reporter

[Excerpted p. 50, line 4-25; p.51, line 1-19]

VIKEN MATOSSIAN, M.D.

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOODMAN:

Q. Good morning.

A. Good morning.

Q. Doctor, would you state your full name for the record please?

A. Viken Matossian.

Q. And would you tell the jury your occupation?

A. I'm a psychiatrist.

Q. Are you an M.D.?

A. Medical doctor.

Q. And where is your practice located?

A. In Howell, Michigan.

Q. And you specialize in psychiatry, then?

A. Yes.

Q. And do you specialize in a specific area of psychiatry?

A. I have several board certificates in adult psychiatry and child-adolescent psychiatry. And I would say that in the past five years I have concentrated primarily in psychotropic medication and their effects.

Q. When you say your have concentrated on psychotropic medication?

A. Yes.

Q. What do you mean by that?

A. A very large part of my day is spent examining individuals for medication effects, and supervising psychotherapy combined with medications.

Q. Okay. And is that what a large part of your practice consists of today?

A. Yes.

Q. Where do you practice?

A. In Howell, Michigan.

Q. And so you are licensed in the state of Michigan to practice medicine?

A. Yes.

Q. Where did you graduate from medical school?

A. Washington University in St. Louis.

[Excerpted p. 54, line 3-12]

Q. Did you assist Mr. Shiplett in any way with his communications with Amtrak in trying to return to work?

A. I believe I spoke to Dr. McLean on two occasions who, as I understood it, was a physician responsible for overseeing the medical health of the locomotive operators.

Q. Was it your understanding that Mr. McLean was Amtrak's medical officer?

A. Yes, sir.

[Excerpted p.54, line 21-23;]

Q. Did you ever indicate to Dr. McLean your thoughts as to whether Mr. Shiplett should be allowed to work while taking Xanax?

[Excerpted p.55, line 1-25]

A. It is my opinion that there was no basis for taking him off of work, simply due to the status of being treated with Xanax and the way he had been.

Q. Okay. It that why you indicated to Dr. McLean?

Q. Yes, it was.

Q. Why is that your opinion?

A. There can be variable responses to medication, but statistically, there's a small chance of impairment with Xanax. In Kurt's case, in particularly, I could detect and Kurt had no complaints of any kind of impairment in sedation or memory, or tension when he was taking the Xanax.

Additionally I would like to comment, Mr. Shiplett was on a constant dose of one milligram to take it at night. Daily doses of Xanax, under one milligram have been studied carefully, and repeatedly, for effects on working memory, attention, and sedation. None of those studies found any significant impairment in a dosage with chronic use of Xanax.

[Excerpted p.62, line 6-22]

Q. In terms of fully relating the significant events, did Mr. Shiplett ever indicate to you, Doctor, whether Amtrak's medical doctor, Mr. McLean, told him to stop taking Xanax cold turkey?

A. Yes, he did say that.

Q. If, in fact, Dr. McLean told Kurt Shiplett to stop taking Xanax cold turkey, do you believe that was responsible

or irresponsible on the part of Dr. McLean?

A. I was shocked to the point that I actually didn't give it absolutely any credence. It seemed so unpredicted. It was hard for me to ignore that a physician would make such a recommendation. Stopping Xanax abruptly after a long-term administration runs the risk of severe complications including seizures and possibly even death.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KURT D. SHIPLETT,
Plaintiff-Appellee,

Case No. 96-71467

v.

Hon.: Horace W. Gilmore

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,
Defendant-Appellant.

VOLUME 4

TRIAL

Proceedings had and testimony taken in the above-entitled matter before HONORABLE HORACE W. GILMORE, District Judge, United States District Court, Detroit, Michigan, on Thursday, July 14th, 1997.

APPEARANCES:

FOR THE PLAINTIFF: Jaimie R. Goodman, Esq.
FOR THE DEFENDANT: Cathleen Giannetta, Esq.

COURT REPORTER: Joan L. Morgan, CSR
Official Court Reporter

[Excerpted p. 3, line 21-25]

KURT D. SHIPLETT

having been called as a witness herein, and after having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

[Excerpted p. 33, line 2-8]

Q. Mr. Shiplett, did you continue to take Xanax from the time it was prescribed to you in 1992, until September 15, 1994?

A. That is correct.

Q. Okay. And did you always take it as the doctors prescribed it to you?

A. Yes, sir.

[Excerpted p. 34, line 7-25; p. 35, line 1-25]

Q. But at least up until September 15, 1994, you were regularly taking Xanax at one milligram?

A. That is correct.

Q. Did you ever take more than one milligram of Xanax any time between June of 1993 and September 15, 1994?

A. No, sir.

Q. Did you ever take Xanax while on the job?

A. No.

Q. Did you ever take Xanax two or three hours before reporting to work?

A. No, sir.

Q. Did you ever take Xanax when you were subject to duty?

A. No, sir.

Q. And when you would get off work, how many hours do you understand before you would have to report to work again?

A. A minimum of eight to ten hours, depending on how many hours I had worked.

Q. And how many hours of sleep would you try to get before reporting to work?

A. As many as I could, at least to eight as possible. Like I said, it depended -- a lot depended on the scheduling, but I always took the Xanax immediately going off duty to make sure I was rested prior to going back on duty.

Q. Was it your practice to take Xanax at least eight hours before you had to return to work?

A. That is correct.

Q. From the time you took Xanax to help you sleep in June of 1992, up to September 15, 1994, how did the Xanax make you feel? Did it affect you in any way?

A. It just helped me sleep. Other than that, no.

Q. Did it make you drowsy the next day when you woke up?

A. No.

Q. Did it impair your coordination in any way?

A. No.

Q. In your judgment, Mr. Shiplett, did it affect your ability in any way to safely navigate a locomotive engine?

A. It helped my ability because I got a good night's sleep.

[Excerpted p. 41, line 3-15]

Q. Now, during the time that you were taking the Xanax, were you performing your job responsibilities as a locomotive engineer safely?

A. That is correct.

Q. While you were taking Xanax as prescribed to you at bedtime, did you receive any feedback from Amtrak as to your safety performance on the Xanax?

A. Prior to 1994?

Q. Yes.

A. Yes, I did.

Q. Okay. Do you recall winning any safety awards, Mr. Shiplett?

A. Yes, I do.

[Excerpted p. 81, line 2-15]

Q. Did Dr. Gallant specifically indicate to you that it was no problem for you to use Xanax at bedtime, and then work as a locomotive engineer the next day?

A. Yes, because that's what I was explaining to him that's what I was doing. And again, he said it would not have been maybe his number one choice of medication, but certainly he didn't see it as a safety factor.

Q. Did Dr. Gallant upon his conclusions of his examination indicate to you his opinion as to whether you were mentally and physically fit for returning to work as a locomotive engineer?

A. Yes, that's what he indicated.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KURT D. SHIPLETT,
Plaintiff-Appellee, **Case No. 96-71467**

v. **Hon.: Horace W. Gilmore**

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,
Defendant-Appellant.

VOLUME 7

TRIAL

Proceedings had and testimony taken in the above-entitled matter before HONORABLE HORACE W. GILMORE, District Judge, United States District Court, Detroit, Michigan, on Thursday, July 17th, 1997.

APPEARANCES:

FOR THE PLAINTIFF: Jaimie R. Goodman, Esq.
FOR THE DEFENDANT: Cathleen Giannetta, Esq.

COURT REPORTER: Joan L. Morgan, CSR
Official Court Reporter

[Excerpted p. 11, line 3-13]

Q. Okay. Isn't it true, Dr. McLean, "that side effects of Xanax, if they occur, are generally observed at the beginning of therapy and usually disappear upon continued medication?

A. They may, but they may also come back during the use.

Q. That statement that I just read to you, sir, isn't that statement right out of the "Physicians' Desk Reference"?

A. Yes, sir, it is.

[Excerpted p. 13, line 3-25; p. 14, line 1-16]

Q. All right. And you also determined, did you not, that prescription, at least according to the documentation received by you from Dr. May, indicated that a prescription was written for Xanax, one milligram, as a sleeping pill to be taken at bedtime for patient, Kurt Shiplett.

A. That's correct.

Q. And you understood then at the time that Mr. Shiplett was taking the Xanax at that time to help him sleep.

A. That's correct.

Q. And notwithstanding all that, you decided that he could not perform his responsibilities as a locomotive engineer; is that correct?

A. As I testified yesterday, not only Mr. Shiplett, but all locomotive engineers working for Amtrak.

Q. That's what I want to get to right now. So, in other words, just so I understand you correctly, it doesn't matter who the locomotive engineer is, it doesn't matter what the dosage, it doesn't matter when they take it, the bottom line is, it's your policy on behalf of Amtrak that a locomotive engineer cannot operate a locomotive engine or perform his job while taking Xanax.

A. That is correct, sir.

Q. So, in other words, Amtrak has a blanket policy prohibiting any locomotive engineer from operating a locomotive engine while taking Xanax.

A. That's correct, sir.

Q. All right. So, the fact that Mr. Shiplett may have been only taking one milligram of Xanax,

as opposed to four milligrams of Xanax, was of no consequence to you?

A. That's correct.

Q. And the fact that Mr. Shiplett was taking Xanax at bedtime and was taking it eight hours before he would report to work is of no consequence to you; is that correct?

A. That's essentially correct, sir.

[Excerpted p. 16, line 7-25]

Q. You never examined Mr. Shiplett; did you, ever?

A. The answer is, as Corporate Medical Director of the corporation, I examined no patients.

Q. Is your answer "no?"

A. The answer is "no," sir.

Q. Okay. You never conducted any tests of any kind on Mr. Shiplett; did you?

A. Mr. Shiplett was examined for the corporation by Dr. Gallant.

Q. I understand what you testified to. I'm asking you, did you conduct any tests on Mr. Shiplett, yes or no?

A. The answer is "no." There's no reason I should.

Q. And just so I'm clear, you make a determination that Mr. Shiplett cannot perform his job without testing or examining him personally. Is that a true statement?

A. It's a true statement, but I'd like to expand on it if I could.

[Excerpted p. 30, line 4-16]

Q. Now, Dr. McLean, let me just go over a little bit regarding your background, if we could.

A. Yes, sir.

Q. You are not Board Certified in Psychiatry; are you?

A. That is correct.

Q. Okay. In fact, would it be fair to say that psychiatry is not an area of your specialty? It's not an area you specialize in.

A. For the direct treatment of patients, no.

Q. Have you ever -- during the time that you worked at Amtrak, did you ever treat patients from a psychiatric standpoint?

A I previously testified I did not treat patients.

[Excerpted p. 31, line 3-7]

Q. And you've never prescribed medication to anyone for purposes of any emotional disorders during the time that you worked at Amtrak; did you?

A. I did not prescribe medication because I do not treat patients.

[Excerpted p. 32, line 14-25; p. 33, line 1-11]

Q. Now, are you familiar with the term, "psychopharmacology?"

A. Certainly.

Q. Do you have any special training in that area?

A. Not as a trained psychiatrist.

Q. Okay. Were you aware of -- do you know an individual by the name of Dr. Viken Matossian?

A. I spoke with Dr. Matossian on the telephone and I have, indeed, checked his credentials.

Q. And, in fact, his credentials, as they relate to the area of psychopharmacology, were impressive; were they not?

A. They are.

Q. In fact, he had more qualifications in that area than you do; correct?

A. Yes.

Q. And he had more qualifications in the area of psychiatry than you do.

A. That is correct.

Q. In fact, I believe Dr. Matossian, and you made reference to this in your notes, was a Diplomat of the American Board of Psychiatry; correct?

A. That is correct.

[Excerpted p. 35, line 18-25; p. 36, line 1-4]

Q. Okay. You would agree with me that you would have to physically observe someone in order to determine whether they are alert or not; correct?

A. That's correct.

Q. So, in terms of whether Mr. Shiplett's use of the Xanax affected his alertness, you would have not know; correct?

A. That's correct.

Q. And in terms of whether the Xanax affected Mr. Shiplett's coordination, you would not know without physically observing him; correct?

A. That is correct, at the time.

[Excerpted p. 37, line 6-16]

Q. Now, prior to making the decision to prohibit Mr. Shiplett from using Xanax, did you ever review any of Mr. Shiplett's medical records that were kept by his treating physicians?

A. The only treating physician that I knew that Mr. Shiplett had was Dr. May and I was in direct discussion with Dr. May.

Q. You never reviewed any of Dr. May's records; did you?

A. No, sir.

[Excerpted p. 40, line 10-20]

Q. And it was your understanding --I believe you said you and Dr. Matossian had "philosophical differences" regarding whether Mr. Shiplett should be able to use the Xanax; correct?

A. That's correct, sir.

Q. And it was clear to you based on your discussions with Dr. Matossian, that Dr. Matossian believed that Mr. Shiplett would be able to safely perform his responsibilities by using Xanax at bedtime; correct?

A. That was what was expressed to me.

[Excerpted p. 42, line 6-23]

Q. So, in fact as I understand it, Mr. Shiplett's performance, whether it was excellent, above average, or whatever it was, had no impact on your decision as to whether he was able to use Xanax at bedtime.

A. As I testified, he can certainly use Xanax at bedtime. He may not operate a locomotive engine under the influence of Xanax.

Q. So, even if all his performance records indicate that he was safely performing his job responsibilities, and operating as an above-average engineer while using Xanax at bedtime, that would have meant nothing to you.

A. As I've testified, the answer is we will not permit him to operate with Xanax as a locomotive engineer.

Q. And that's a uniform policy across the board for any locomotive engineers.

A. Through the time that I was at Amtrak, yes.

[Excerpted p. 60, line 13-22]

Q. And you've reviewed the "Physicians' Desk Reference"; have you not?

A. That's correct.

Q. Isn't it true, sir, that these figures in terms of the percentage of people who may effect drowsiness and dizziness, and all this other stuff that you cited, involves studies where individuals are taking up to four milligrams of Xanax over a ten-week period; isn't that true?

A. Sir, I can't say whether that's true or not.

[Excerpted p. 64, line 2-9]

Q. Okay. Now, you would agree with the proposition, would you not, Dr. McLean, that Xanax affects different individuals differently.

A. That's correct.

Q. Okay. So, Xanax potentially could have no affect on a particular person depending on who that particular person is; correct?

A. That's correct.

[Excerpted p. 70, line 7-25]

Q. And the Federal Railroad Administration leaves it in the Medical Review Officer's hands to determine what prescription medication locomotive engineers can use; correct?

A. That's correct.

Q. There are no Federal Railroad Regulations which specifically state that a locomotive engineer cannot operate a locomotive while using Xanax; are there?

A. That is correct.

Q. So, in fact, the Federal Railroad Administration doesn't direct you to tell locomotive engineers they can't use Xanax. You make that decision on your own.

A. That is made in the name of the corporation, yes.

Q. By you.

A. By me.

Q. Okay. Not the FRA.

A. Not the FRA.

[Excerpted p. 97, line 4-11]

Q. All right. Now, isn't it true, though, that back in 1994, Mr. Shiplett requested that you accommodate him by allowing him to work in another position?

A. As I said, sir, I do not recall that.

Q. So, you don't recall that either way, one way or the other; correct?

A. That's correct.

Title 28
Judiciary and Judical Proceedure

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

. . .

§1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 42 [Excerpted]
Americans With Disabilities Act

---

§12102. Definitions

As used in this chapter: . . .

(2) Disability

The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individuals;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

. . .

Title 42 [Excerpted]
Americans With Disabilities Act

---

§12111. Definitions

As used in this chapter:

. . .

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

. . .

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

. . .

Title 42 [Excerpted]

§12112. Definitions

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes--

> **(1)** Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
>
> . . .
>
> **(5)(A)** not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> . . .

Title 42 [Excerpted]
Americans With Disabilities Act

---

§12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

. . .

Title 45 [Excerpted]
Federal Employer's Liability Act

§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Part 1630--REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

§1630.2. Definitions

...

(o) ***Reasonable accommodation.***

(1) The term *reasonable accommodation* means:

...

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

. . .

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar

accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

. . .

(r) ***Direct Threat*** means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

. . .

(2)

Supreme Court, U.S.
FILED
DEC 1 1999
OFFICE OF THE CLERK

No. 99-735

IN THE

Supreme Court of the United States

KURT D. SHIPLETT,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRAK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KATHLEEN J. FORD
NATIONAL RAILROAD PASSENGER CORPORATION
LAW DEPARTMENT
60 Massachusetts, Ave., N.E.
Washington, D.C. 20002
(202) 906-3000

MARK S. LANDMAN*
WILLIAM G. BALLAINE
JYOTI M. FRIEDLAND
LANDMAN CORSI BALLAINE & FORD P.C.
120 Broadway, 27th Floor
New York, New York 10271
(212) 238-4800

Attorneys for Respondent, National Railroad Passenger Corporation d/b/a Amtrak

*Counsel of Record

28,18

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent National Railroad Passenger Corporation, also known as Amtrak, has no corporate affiliates.

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STATEMENT OF THE CASE

National Railroad Passenger Corporation ("respondent" or "Amtrak") respectfully submits this brief in response to the petition of Kurt D. Shiplett ("petitioner" or "Shiplett"), which seeks review of the Sixth Circuit's unpublished order entered June 17, 1998 (the "Order"). The Sixth Circuit Order reversed a $500,000 judgment that had been entered in petitioner's favor based on a general verdict rendered by the jury concerning petitioner's claims under the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 *et seq.* ("ADA"), the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 *et seq.*, the Michigan Handicappers' Civil Rights Act, MCLA 37.1101 *et seq.*, and the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), and directed entry of judgment for Amtrak on petitioner's claims. App. A-27.

First, the Sixth Circuit's decision does not "directly conflict" with this Court's decision under the ADA in *Bragdon v. Abbott*, 524 U.S. 624 (1998), as petitioner argues. Pet. 9-14. Quite the contrary, it is in harmony with both *Bragdon*, and another significant recent decision of this Court, which petitioner neglects to cite, *Albertsons, Inc. v. Kirkingburg*, 119 S.Ct. 2162 (1999). Similarly, the Sixth Circuit's decision does not conflict with the principle that an "individualized inquiry" should generally be undertaken to determine whether an ADA plaintiff poses a direct threat to health and safety. Pet. 14-18. That *general* principle has no application given the evidence and federal regulations applicable to *this* case. In any event, both of petitioner's "conflict" arguments ignore the Sixth Circuit's alternative holding that Shiplett's evidence failed to rebut Amtrak's non-pretextual justification for its actions, thus defeating his ADA claim even if he were "otherwise qualified" under ADA standards.

Equally meritless is petitioner's contention that there is "conflict" and "confusion" in the circuits regarding an employer's duty to reasonably accommodate that warrants review by this Court. Pet. 18-23. Petitioner's argument is premised on a misreading of the case law and, once again, on a failure to address the alternative ground upon which the Sixth Circuit properly rejected petitioner's "reasonable accommodation" claim.

Finally, neither the record in this case, the Sixth Circuit's Order, nor any other lower court decision justifies this Court's review of petitioner's claim that Amtrak negligently caused him to suffer emotional injuries cognizable under the FELA. Pet. 23-26. The Sixth Circuit's application of this Court's decision in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) was entirely appropriate.

Petitioner's arguments largely reflect his disagreement with the Sixth Circuit's conclusion that viewing the evidence in a light most favorable to petitioner, there is insufficient evidence to support elements of petitioner's ADA and FELA claims. App. A-11--26. There is no cause for this Court to review what basically amount to fact-bound arguments concerning the evidentiary record below.

The Full Factual Record.

Petitioner either ignores or quickly skips over indisputable evidence that demonstrates why the Sixth Circuit's Order is correct.

Petitioner Kurt D. Shiplett ("petitioner" or "Shiplett") was employed by Amtrak in 1994 as a locomotive engineer.

App. A-2 -- A-3; JA 437.[1] He served as an extra-board engineer, which meant he was on-call for duty, subject to federal regulations and collective bargaining agreement requirements governing time off between assignments. App. A-2 -- A-3; JA 573-574.

On September 15, 1994, while operating a passenger train, petitioner overshot the platform at not one but three station stops. The first two times he missed his "spot" at the station by one to one and one-half car lengths; the third time, he overran the Jackson station stop by the entire length of the train, about 600-700 feet. App. A-2; JA 91-92, 108-111, 621.

Petitioner's supervisor testified at trial that the Jackson overrun was "unusual" and "surprising," an event that caused him "concern" about Shiplett's health. JA 310.[2] Although Shiplett told the supervisor he was "tired" and had made a "misjudgment" (App. A-2; JA 307 487-488, 567-568), Shiplett would later admit that he had been off duty at least 24 hours before his shift began. JA 569-570.

Since he had violated Amtrak's operating rules, Shiplett was required to submit to a "reasonable suspicion" drug and alcohol screen. App. A-3; JA 490-492. He tested positive for benzodiazepine, a class of drugs that includes Xanax. App. A-3; JA 625. Although Shiplett had never before tested positive for any drug, the evidence at trial revealed that petitioner had obtained prescriptions for Xanax from various personal physicians over many years and had been taking Xanax

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[1] "JA" citations are to the joint appendix filed in the Sixth Circuit in connection with this appeal.

[2] The supervisor was later disciplined for letting Shiplett continue to operate the train after the Jackson overshoot. App. A-2; JA 93, 96, 303-305.

continuously since at least 1992 to alleviate, in his words, a "sleep disorder." JA 413, 444-445, 449-452, 459-461, 494, 574-580; *see* App. A-3 -- A-4.

There is no dispute that Xanax is a highly addictive, hypnotic drug. App. A-3; JA 407, 499, 625-626, 638, 645-647, 678, 707-708, 720. The potential side effects of Xanax include drowsiness, light-headedness and impaired memory and coordination. App. A-3. Xanax can be half-effective as long as 26 hours after ingestion, and the average duration of side effects is about 11.5 hours. App. A-3; JA 93, 96, 180-184, 410, 625-626, 643-648, 659.

The September 15, 1994 incident was reported the next day to Amtrak's medical director, Dr. Robert McLean, who was told Shiplett had been removed from service for an operating rule violation. App. A-4; JA 93, 96, 163-167, 491-493, 621-622. Dr. McLean was requested to determine whether the Xanax was in Shiplett's system "legitimately" and whether the drug might have caused Shiplett to miss three station stops. App. A-4; JA 623-624.

Dr. McLean spoke to Shiplett by telephone on September 19; petitioner told the medical director that he had felt extremely drowsy on the 15th and did not recall overshooting the train stations. App. A-4. Shiplett also told the medical director that he had noted he was on Xanax at his last Amtrak physical examination in 1992. App. A-4; JA 90-92, 113-115, 322-323, 622-623, 625, 627-630.[3] Dr. McLean's

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[3] An Amtrak file maintained in Detroit included a 1991 physical examination form reflecting that Shiplett was taking Xanax on or before June 1991 and had been warned by a doctor not to operate a motorized vehicle while taking the drug. App. A-3 -- A-4; JA 93-94, 143, 329-330, 447-448

office did not, however, have copies of any prior physical examinations of Shiplett; the medical director was unaware Shiplett was taking Xanax and would *not* have authorized Shiplett's use of the drug. App. A-5; 627-628. In point of fact, the evidence showed that Shiplett had been prescribed Xanax in 1992 at a dosage of .25 milligrams at bedtime, and by 1994 his daily prescribed dosage was up to 1.0 milligrams, a four-fold increase. App. A-3 -- A-4.

According to Shiplett, he also spoke to Dr. McLean around September 20, 1994, at which time the medical director supposedly told him to stop taking Xanax immediately. App. A-4; JA 494-496. Dr. McLean flatly denied giving such advice and his notes reflect that he told Shiplett to see his personal physician, because the drug needed to be withdrawn gradually over a two to three week period. JA 93, 97, 189-211, 649-651; *see* A-4. Shiplett never denied being told by Dr. McLean to contact his personal physician, Dr. May, immediately. JA 408, 597-598. According to Shiplett, he immediately stopped taking Xanax and suffered headaches, shakiness, insomnia and nausea. App. A-4.

After speaking to Shiplett, Dr. McLean called petitioner's personal physician, Dr. May, who confirmed that he had prescribed Xanax to Shiplett and that the petitioner had told the doctor he worked as a railroad engineer. App. A-5; JA 93, 121, 584, 631-632, 634-635.

Based on the information gathered, Dr. McLean decided that Shiplett "should not be held to account for having this drug ... in his system," and treated the September 15 drug result as though it were a negative test result. JA 634-635; *see,* App. A-5. As a result, Shiplett was not obligated either to give a clean urine sample within 30 days or to enter an Employee Assistance

Program as normally would be required under company policy. App. A-5 -- A-6.

Amtrak's medical director also determined, however, that Xanax could have contributed, alone or in combination with other factors, to Shiplett's "significant operational error." App. A-6; JA 635-637, 642. Dr. McLean testified that he was unwilling to take the chance that petitioner might be operating a train while under the influence of Xanax, and thus he temporarily disqualified petitioner from working as a locomotive engineer. App. A-6; JA 633, 642-643, 649. On September 22, 1994, the medical director issued a directive that Shiplett "may not operate further as a Locomotive Engineer while taking Xanax" and directed that Shiplett be scheduled for a fitness for duty examination. JA 93-94, 134, 642-644, 652, 717; *see*, App. A-6. In connection with the fitness exam, the medical director asked that "the examiner ... rule out some unknown medical problem that may have contributed to his ... operating rule violations." JA 93-94, 134.

At trial, Dr. McLean stressed, and petitioner conceded, that locomotive engineer is a safety-sensitive position, requiring someone who is extremely alert and capable of coping with work pressures, including schedule deadlines and emergencies. JA 93, 97, 186-188, 564-565, 617-620. The engineer is responsible for passengers being transported at substantial speeds in equipment weighing many hundreds of tons, and thus Shiplett's actions on September 15, according to Amtrak's medical director, represented both a "rare occurrence" and a "significant problem." JA 617-620, 623-624, 705. In making his decision on how to proceed, Dr. McLean testified that he would "not take chances with our passengers." JA 642-643.

Shiplett was examined on September 29 by an independent medical doctor, Dr. Gallant. Although Dr. Gallant

found Shiplett mentally and physically fit to return to work (App. A-6), his report stated that he specifically discussed with petitioner the addictive properties of Xanax and "recommended to him that he refrain from ever taking this medication." App. A-5; JA 93, 127-128, 652-655. Dr. Gallant's report also noted that Shiplett had told him that he had initially discontinued taking Xanax, but that "two days ago he took a half of a tablet because he could not sleep." JA 93, 127-128; *see also*, JA 496-497, 582-583.

On September 30, Dr. McLean cleared Shiplett to return to work as a locomotive engineer so long as Shiplett was not taking Xanax, or other medication with similar side effects, and so long as Shiplett reported to his supervisor whenever he considered himself incapable of working due to drowsiness. App. A-6; JA 93, 95, 157.

Beginning in early October 1994, Shiplett came under the care of a new personal physician, Dr. Matossian. He presented to Dr. Matossian with severe panic attacks and depression. According to Shiplett, he was taking Xanax at the time, using Dr. May's prescription. Petitioner's new doctor prescribed a variety of other drugs to treat Shiplett's medical condition and enable him to return to work. JA 93-94, 137, 381, 399-402, 409, 581-582, 584, 587-588, 590.

On November 9, Dr. Matossian orally reported to Dr. McLean that petitioner was doing well on a new regimen of drugs, which did not include Xanax. All of those drugs were "highly acceptable" to the medical director. Dr. Matossian reported that Shiplett was "sleeping very well," leading Dr. McLean to testify at trial that "it appeared we had a very favorable result." JA 93, 97, 402-403, 670-671, 673.

Shiplett's doctor then provided a written report to Dr. McLean, dated November 11, 1994, which set forth petitioner's new regimen of medications and pronounced Shiplett fit to resume all previous activities. App. A-6; JA 93, 123-125, 402-403, 672. Dr. Matossian's report concluded that petitioner "has been successfully treated and is feeling better than ever." JA 93, 123-125. By memorandum dated November 14, 1994, Dr. McLean promptly determined that Shiplett could "return to work without restrictions." App. A-6; JA 93, 122, 673-674.

In accordance with the terms of the collective bargaining agreement between Amtrak and the Brotherhood of Locomotive Engineers, Amtrak then arranged a return to work physical for Shiplett, which, as petitioner well knew, would include a urinalysis. App. A-6 -- A-7; JA 585-586, 589-590, 674-675. Yet, when Shiplett was given the return-to-work exam on November 23, his urine tested positive for Xanax. App. A-7. Petitioner would later claim that he had mistakenly neglected to take his new medications when he went on vacation and, three days before the exam, he took some Xanax that he "happened" to have with him on the trip. App. A-7; JA 404, 510-512, 586-588, 675-679.

Under Amtrak's policy and the terms of its union labor agreement, the fact that Shiplett failed this drug test meant he now had the option of taking a retest and providing a negative urine sample within 30 days of the positive result, or, alternatively, entering a company-provided Employee Assistance Program ("EAP") within 30 days. App. A-7.

By letter dated November 29, 1994, Amtrak formally notified Shiplett of the positive test result and described his two options under Amtrak's policy. App. A-7; JA 93, 126, 679-681. Dr. McLean also called Dr. Matossian in early December to discuss Shiplett's options, adding that he would see if

Amtrak could do something to help "maintain the doctor/patient relationship with Dr. Matossian." App. A-7; JA 682-684.

Shiplett never responded to Amtrak's November 29, 1994 drug notification letter. In accordance with the applicable labor agreements, Amtrak then sent petitioner a notice letter dated January 5, 1995 advising that it had instituted an investigation and would conduct a hearing on Shiplett's violation of Amtrak's rules based on his failure to respond to Amtrak's November 29 notification letter. App. A-7; JA 93, 95-96, 158-159, 163-167, 168-179, 685-690, 711-712.

Shortly before Amtrak's notice of investigation letter was issued, Dr. Matossian sent Amtrak a December 23, 1994 letter, which advised that Shiplett "is ... off work indefinitely." App. A-7; JA 120, 595, 685-686, 690.[4] Although Dr. Matossian's letter did not affect the January 5, 1995 charges, Dr. McLean then recommended indefinite postponement of any hearing. Dr. McLean arranged for a waiver of the company drug policy so that Shiplett could obtain treatment from Dr. Matossian, rather than treatment under the oversight of the EAP, so long as upon completing the doctor's program, Shiplett could, among other things, test negatively for drugs, including benzodiazepines. JA 93-94, 135-136, 595-596, 687-697. Dr. McLean memorialized this new option in January 26, 1995 letters to Dr. Matossian and to Shiplett. App. A-8; JA 93-94, 132-133, 135-136, 404-405, 554-559, 694-697, 700-701. Petitioner did nothing to avail himself of this new option. App. A-8; JA 700.

In early 1995, Shiplett applied to the Railroad Retirement Board ("RRB") for disability benefits. App. A-8;

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[4] At trial, petitioner would admit he was completely disabled as of December 23, 1994. JA - 520.

JA 93-94, 145-154, 537-538. Petitioner's application, which was supported by a report from Dr. Matossian, certified that Shiplett had been suffering since March 15, 1991 from a "lower back injury, gastrointestinal problems, Epstein-Barr virus, uncontrollable mood swings, psychological disorders, inability to concentrate, confusion, depression, severe mood swings, homicidal/suicidal tendencies, forgetful" and that Shiplett had been suffering from May 1991 to September 1994 from "fatigue, confused, insomnia, fear of losing control of oneself/crazy, lack of concentration, panic attacks."[5] On his application, Shiplett also represented that because of his condition, he had been unable to work since September 15, 1994, the date he overshot the station and tested positive for Xanax, that his condition prevented him from working due to his violent tendencies, lack of concentration, forgetfulness, panic attacks, fatigue, and "mood swinging," and that he found it hard, among other things, to drive a motor vehicle or sit. JA 93-94, 145-154, 419-420, 426-429, 524, 538-547.[6] Shiplett was awarded monthly disability retirement benefits from the RRB; Amtrak then transferred petitioner to a disability retirement status, all effective as of September 15, 1994. App. A-8; JA 93-95, 144, 145-154, 155, 156, 549, 550-552, 553, 703-704.

On April 6, 1995, Amtrak sent a formal letter offering Shiplett the opportunity to request a reasonable accommodation, stating, in part:

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[5] Shiplett's long history of medical difficulties was also acknowledged during the trial testimony of petitioner's two medical experts. JA 369, 376-377, 413-422.

[6] The application correctly acknowledged that Shiplett had *not* been medically disqualified from work by his employer. App. A-8; JA 93-94, 145-154, 545.

> In order to evaluate your condition and thereby determine your need for reasonable accommodation, it will be necessary for your physician to provide medical documentation of your disability to Amtrak's Medical Director, Dr. Robert McLean, for review.... The information forwarded to Dr. McLean shall identify any restrictions or limitations to your activities....

App. A-8; JA 93, 97, 185, 562-564, 698-700. Shiplett did not respond to this offer. App. A-8 -- A-9; JA 563-564, 700, 702. Shiplett also never completed a "Request for Reasonable Accommodation" form. JA 93, 97, 254, 564.

McLean spoke with petitioner again on July 11, 1995, and referenced Amtrak's letters in January and April, to which there had been no response. App. A-9; JA 702-703. Shiplett said that he was only interested in working as an engineer, in exchange for which he would drop any discrimination charges against Amtrak. App. A-9; JA 702-703.

At trial, Shiplett claimed that he had orally asked Dr. McLean "sometime after September 27, 1994" whether "he [would] consider letting me work as a conductor or an assistant conductor." JA 503-504, 561-562. Dr. McLean had no recollection of any such request and there is nothing anywhere documenting or corroborating this alleged request. App. A-20 -- A-21; JA 703, 714-715. Nor did Shiplett contend at trial that he ever again raised this option with the medical director or anyone else. Moreover, Shiplett offered no evidence at trial to

suggest that there were any conductor or assistant conductor positions available to someone with his union seniority. Finally, Shiplett conceded the safety-sensitive nature of a conductor's position, acknowledging that the conductor must supervise coach cars and, in case of emergency, evacuate passengers from the train. App. A-21; JA 561.

Dr. McLean testified at trial that following a major accident in late 1992, he had given sworn testimony before the National Transportation Safety Board ("NTSB") that the railroad did *not* permit engineers to operate trains while on Xanax. App. A-9. The NTSB thereafter specifically recommended that Amtrak develop programs "to ensure that the individuals [engineers] will not take drugs, such as benzodiazepines and barbiturates." App. A-9; JA 93, 97, 251-253, 639-640. Dr. McLean also testified that in early 1995, an NTSB toxicologist, who apparently had learned about the Shiplett matter, called the medical director to reiterate the NTSB's position that Amtrak should not permit engineers to use Xanax. App. A-9; JA 709-711.

In addition, the Federal Railroad Administration ("FRA") conducted an investigation into the Shiplett matter in response to a Congressional request. App. A-9. The FRA then issued a December 30, 1994 letter concluding that Dr. McLean's actions were consistent with 49 CFR Part 219.103, which, the FRA advised, "requires medical officers to ensure that medications used by employees are consistent with the safe operation of an employee's duties." App. A-9 -- A-10; JA 93-94, 131, 668-670.

In addition, the Equal Employment Opportunity Commission ("EEOC") investigated Shiplett's discrimination charges and found no reasonable basis for the charges. App. A-10; JA 93, 96, 162, 536.

At trial, petitioner offered testimony from two private medical physicians, one of whom was Dr. Matossian. JA 354-355, 381. Neither had any background in transportation or public safety. JA 366, 406. Although they opined that there was no medical need to prevent petitioner from resuming his engineer's job due to Shiplett's use of Xanax, neither doctor disputed the side-effects of the drug; Dr. Matossian admitted an engineer should not operate a train if he is drowsy; neither doctor challenged the connection between Shiplett's significant operational error on September 15 and his use of Xanax; neither doctor contended that Shiplett was medically required to use Xanax, rather than some other prescribed medication; Dr. Matossian admitted that any opinion he had about Dr. McLean's conduct "would depend [on] what Dr. McLean's function was" and conceded that Amtrak's medical director had "referred to [Amtrak's] policy, transportation and safety rules that *really I know nothing about* [emphasis added]." JA 388, 407, 410-412, 421.

In addition, neither of petitioner's medical experts suggested that Shiplett's emotional problems were due to Shiplett's alleged decision to immediately cease all use of Xanax in response to Dr. McLean's purported directive on September 20, 1994. On the contrary, one of Shiplett's doctor's attributed his emotional breakdown to his "rage" over the perceived "injustice" of his having been prevented by Amtrak from resuming work with the railroad. JA 360, 362-363, 368, 370-375.

REASONS FOR DENYING THE WRIT

A. <u>There is No Ground for Reviewing the ADA Claim</u>

The Sixth Circuit's decision does not, as petitioner argues, conflict with this Court's decision in *Bragdon* by

purportedly deferring to the opinion of a private health care professional. Pet. 9-14. Quite the contrary, the Sixth Circuit deferred to the unanimous judgments of Dr. McLean, the NTSB and the FRA because they were collectively "charged with [responsibility for] transportation safety." App. A-20.

The evidence unambiguously demonstrates that before Shiplett's station overshoot the NTSB had recommended, and Dr. McLean had decided, that Amtrak's engineers would not be permitted to use drugs like Xanax. App. A-8. Moreover, when the FRA later investigated the Shiplett incident, it specifically concluded that Dr. McLean's actions had been consistent with his authority under a regulation promulgated by the FRA to address the safety issue of alcohol and drug use, 49 CFR § 219.103. App. A-8. Under 49 CFR § 219.103, even when a private treating medical practitioner notifies the railroad of his or her good faith judgment that a railroad employee's use of a prescribed drug is consistent with the safe performance of his duties, that notification "does not restrict any discretion available to the railroad to require that employees . . . obtain prior approval for such use." *See*, 49 CFR § 219.103.

Section 219.103(c) should be read in conjunction with related FRA regulations on this subject, including 49 CFR § 219.101(a) (prohibiting an employee from working while "under the influence of or impaired by any controlled substance"), 49 CFR § 219.101(c) (authorizing a railroad to impose an "absolute prohibition on the presence of . . . any drug in the body fluids of persons in its employ"), 49 CFR § 219.102 (directing that "no employee . . . may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103"), and 49 CFR § 219.105(b) (directing that a "railroad must exercise due diligence to assure compliance with § 219.101 and § 219.102 by each covered employee"). Together, these FRA promulgated regulations reveal that

Amtrak's medical director not only had regulatory discretion to withhold approval for Shiplett to resume work as an engineer while taking Xanax, Dr. McLean had a public duty under the federal regulations to assure that an employee would *not* be permitted to report for work while "under the influence of or impaired by" this highly-addictive prescription drug. Given Shiplett's troubling conduct on September 15, 1994, and Dr. McLean's conclusion that the significant operational error was potentially linked to Shiplett's use of Xanax, Amtrak's medical director could hardly have made any rational decision other than the one he did -- to keep Shiplett temporarily out of service until he could return to work without Xanax in his system.

Not only does petitioner wrongly assert that the Sixth Circuit's decision conflicts with *Bragdon*, Shiplett ignores the relevance of this Court's even more recent decision in *Albertsons, Inc.*, 119 S.Ct. at 2169-70 & n.13 (1999). In *Albertsons*, this Court held that an employer may require an employee to satisfy a job function requirement that is contained in a federal regulation without violating the ADA. *See also, Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 628-29 (7th Cir. 1998). *Albertsons* demonstrates that the ADA does not require employers to act with blinders on; they may be guided by applicable federal regulations in determining whether an employee is qualified to perform essential job functions. *Bragdon*'s instruction that courts should not defer to the medical views of a private practitioner has nothing to do with *this* case, which concerns the railroad's duty and authority under federal regulations to decide whether to approve an employee's use of a highly-addictive prescription drug.

Moreover, the decision below is, if anything, in harmony with *Bragdon*'s instruction that the views of *public* health officials are entitled to "special weight and authority" in assessing whether an ADA complainant poses a direct threat to

safety. *Bragdon*, 118 S.Ct. at 2211. *See also*, *Onishea v. Hopper*, 171 F.3d 1289, 1297 (11th Cir. 1999). This is not, as petitioner suggests, a case in which the court below relied on the opinion of a *private* health provider. On the contrary, the Sixth Circuit deferred to the collective judgments of *public* entities -- the FRA and NTSB -- that were acting pursuant to their responsibilities to advance *public* safety, and a medical officer charged with discretionary responsibilities under FRA-promulgated regulations.

In addition, petitioner ignores the fact that the Sixth Circuit held, *in the alternative*, that Amtrak had presented a legitimate, non-pretextual reason for temporarily precluding plaintiff from his employment as a locomotive engineer, one which Shiplett *never* rebutted with probative evidence. App. A-22, n.2. Even when a plaintiff presents a prima facie case of discrimination, he still bears the burden of showing that the employer's legitimate explanation for its actions amounted to a pretext for discrimination. *See*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). *See, e.g.*, *Shorette v. Rite Aid of Maine, Inc.*, 155 F.3d 8, 15 (1st Cir. 1998); *Sheridan v. E.I. duPont de Nemours & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996)(en banc), *cert. denied*, 521 U.S. 1129 (1997). Here, the opinions of petitioner's private practitioners – that Xanax could be taken safely by Shiplett – did not remotely undercut Amtrak's good faith explanation for why it was not prepared to take a chance with the safety of Amtrak's passengers. Circuit courts have repeatedly denied a plaintiff's claim of discrimination under the ADA based on safety-related concerns similar to those presented here. *See*, *Hill v. Kansas City Area Transp. Authority*, 181 F.3d 891 (8th Cir. 1999) (discharged bus driver had fallen asleep potentially due to blood pressure medications); *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998) (police recruit had suffered two diabetic episodes that could have been avoided medically); *E.E.O.C. v. Amego,*

Inc., 110 F.3d 135 (1st Cir. 1997) (employee with diagnosed depression discharged from organization that cares for severely disabled people); *Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995) (police officer with diabetes terminated after suffering diabetic reaction on duty); *see also*, *Baert*, 149 F.3d at 628-629 (insulin dependent truck driver conceded on appeal that law prohibits him from holding commercial license).

The irrefutable evidence fully supports Amtrak's non–pretextual explanation for its conduct. Moreover, petitioner offered no expert testimony to refute that Xanax may have been a cause of Shiplett's serious operational error. Petitioner's experts did not purport to be experts in railway safety. Petitioner's experts never once suggested that Xanax was the only drug Shiplett could safely take. Amtrak thus had ample basis for keeping Shiplett temporarily out of service until he stopped using Xanax. His own physician then prescribed a new regimen of drugs that left Shiplett feeling better than ever. Yet, petitioner proceeded to fail the next drug test and thereafter failed to or refused to comply with the options with which he was presented based on company policy. There is, in short, no reason for this Court to conduct the same thorough record review undertaken by the Sixth Circuit, which concluded that Shiplett had failed to offer evidence that Amtrak's reason for keeping Shiplett out of service was pretextual. App. A-22 n.2.

Petitioner's second ADA argument – that the Sixth Circuit improperly failed to base its decision on an "individualized assessment" of Shiplett's condition (*see* Pet. 14-18) – can be disposed of in short order. First, this Court has indicated that individualized assessments are *not* always required. *See, Albertsons, Inc.*, 119 S.Ct. 2162, 2171 (no individualized assessment required when applicable federal regulations "contain no qualifying language about

individualized determinations"); *Traynor v. Turnage*, 485 U.S. 535, 550 & n. 11 (1988)(instructing that decision in *School Board of Nassau v. Arline*, 480 U.S. 273 (1987) simply "recognized that the district courts should 'in most cases' undertake an individualized inquiry"). *Albertsons* demonstrates that an individualized assessment is *not* required where the employer properly relies on a federal regulation. *Albertsons*, 119 S.Ct. at 2171. In this case, Amtrak had discretion to decide under federal regulations that *no one* in a safety-sensitive job would be allowed to use Xanax, and as the FRA's investigation confirmed, Amtrak's judgment in this respect was consistent with federal regulations. Second, as noted earlier, even if Shiplett were "otherwised qualified" based on an "individualized assessment" petitioner failed to offer evidence to rebut Amtrak's non-pretextual justification for its decision. App. A-22, n.2.

Finally, contrary to petitioner's claim (Pet. 18-23), the Sixth Circuit applied the proper burden of proof concerning Amtrak's duty to offer a reasonable accommodation under the ADA. Petitioner must demonstrate that he is qualified to perform any job for which an accommodation is sought. 42 U.S.C. §§ 12111(8), 12111(9) 12112(b)(5)(B). *see, e.g.*, *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694 (7th Cir. 1998); *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 316-317 (3rd Cir. 1999). The record clearly reveals Shiplett failed to satisfy this fundamental ADA requirement.

As the Sixth Circuit noted, plaintiff's alleged oral request that he be permitted to work as a conductor also involved a job that is safety-sensitive. App. A-20-A-21. Thus, for the same reason that Amtrak was entitled to prevent Shiplett from resuming work until he had stopped using Xanax, the Sixth Circuit properly concluded that Amtrak was entitled to

keep him from assuming the safety-sensitive position of conductor until he was free of this highly-addictive drug. Id.

In addition, petitioner is mistaken in asserting that the Seventh Circuit supports his contention that a plaintiff can recover under the ADA even if he cannot identify a vacant position for which he is qualified. *See*, Pet. 19-20, *citing*, *Hendricks-Robinson*, 154 F.3d 685 (7th Cir. 1998) and *Miller v. Illinois Dept. of Corrections*, 107 F.3d 483, 486-487 (7th Cir. 1997). Shiplett ignores other recent Seventh Circuit court decisions directly holding that a plaintiff must identify a vacancy for which he seeks to be accommodated. *See*, *Pond v. Michelin North America, Inc.*, 183 F.3d 592, 595 (7th Cir. 1999); *McCreary v. Libbey-Owens-Ford Co.*, 132 F.3d 1159, 1164 (7th Cir. 1997) *rehearing denied* (Feb. 6, 1998). Similarly, contrary to plaintiff's assertion, there is no confusion in the Ninth Circuit with respect to an employee's burden to demonstrate the existence of a vacant position. *See*, Pet. 21. *Mustafa v. Clark County School Dist.*, 157 F.3d 1169, 1176 (9th Cir. 1998) is not at odds with *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 749 (9th Cir. 1998), in which the Ninth Circuit specifically determined that the plaintiff bears the initial burden of showing the existence of a position for which he seeks an accommodation.

Just as important, petitioner overstates the legal significance of the cases he cites in which various circuit courts describe an employer's duty to engage in an interactive process. Decisions such as *Fjellstad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999) and *Taylor v. Phoenixville School Dist.*, 184 F.3d 296 (3rd Cir. 1999) declined to uphold summary judgment for the employer based on evidence that an employer had failed to make a good faith attempt to engage in the interactive process. But they clearly also instruct that at trial the plaintiff still retains the burden of showing that he was

qualified to hold a particular position for which he claims the right to a "reasonable accommodation." *Fjellstad*, 188 F.3d at 954 and 957 (employee still carries the burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the essential functions of the job and he retains this burden "at all times"); *Taylor*, 184 F.3d at 317 ("nor does [the interactive process] remove the employee's burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the job's essential functions"). Thus, to prevail at trial plaintiff must show that he could have been successfully accommodated *but for the* employer's bad faith. *Taylor*, 184 F.3d at 319-320. This means that a plaintiff still must show at trial that there was a vacancy for which he was qualified because otherwise the employer's alleged bad faith refusal to engage in the "interactive process" would have made no difference. None of the cases petitioner cites can properly be read to support the draconian proposition that evidence of an employer's failure to engage in interactive process is enough to justify an award for plaintiff even when there is no evidence that the process would have been fruitful.

Petitioner offered testimony of a single alleged oral request about the possibility of a conductor's position. There is no hint he ever mentioned it again. Nor is there any evidence that even if Amtrak had pursued this option, a conductor's position would have been available, given petitioner's seniority. Since there is no disputing that a plaintiff always bears the burden of proof, the Sixth Circuit's rejection of Shiplett's reasonable accommodation claim is entirely consistent with applicable legal principles. There is no "confusion" or "conflict" in the circuits meriting review by this Court.

B. There Is No Ground For Reviewing the FELA Emotional Distress Claim

Petitioner's asserted ground for reviewing the Sixth Circuit's rejection of his emotional distress claim under the FELA is meritless. *See*, Pet. 23-26. The crux of petitioner's FELA claim below was not for physical injuries. It was for his complete emotional breakdown. *See*, JA 781-783, 785-788, 792. According to one of his expert witnesses, this breakdown was the result of Shiplett's "rage" over the "injustice" of the fact that Amtrak had "stopped [him] from working" with the railroad. JA 360, 362-363, 368, 370-375. No expert testimony was offered to show that this breakdown was caused, in any way, by the fact that he allegedly had stopped taking Xanax "immediately" based on the purported advice of Dr. McLean.

On this record, the Sixth Circuit quite properly analyzed Shiplett's FELA claim as one for negligent infliction of emotional distress, which meant that it was subject to analysis under the "zone of danger" test articulated by this Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). *See also, Metro-North Commuter R. Co. v. Buckley*, 117 S.Ct. 2113 (1997). The record is devoid of evidence that petitioner's emotional breakdown was due to an imminent fear of physical impact, or the result of any physical injury he suffered for that matter. *See* App. A-26 -- 27.

In establishing the "zone of danger" test, this Court in *Gottshall* warned of the need to protect against frivolous or fraudulent emotional distress claims and the specter of unlimited liability. *Gottshall*, 512 U.S. at 557. *See, Buckley*, 117 S.Ct. at 2119. Under any reasonable application of *Gottshall*, plaintiff's evidence fell woefully short of satisfying the "zone of danger" test applicable to petitioner's emotional distress claim.

C. Summary

The Supreme Court of the United States does "not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnston*, 268 U.S. 220, 227, (1925) (Holmes, J.). The "Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment [the Court is] asked to review.'" *Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U.S. 445, 460, 105 S.Ct. 2768, 2776 (1985) (Stevens, J., concurring in part and dissenting in part), *quoting Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). *See also, General Talking Pictures v. Western Electric Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it").

Petitioner professes to find important legal issues and a conflict among the circuits in a Sixth Circuit Order that thoroughly reviews the record evidence and concludes -- quite correctly -- that petitioner failed to adduce sufficient probative evidence to support his claims. The petitioner's argument "cannot obscure the truth that [what] is involved [in this case] is an appraisal of the fair inferences to be drawn from the evidence." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 455-456 (1959) (Frankfurter, J., dissenting).

CONCLUSION

For all of the foregoing reasons, the petition for issuance of a writ of certiorari should be denied in its entirety.

Dated: December 1, 1999

Respectfully submitted,

KATHLEEN J. FORD
NATIONAL RAILROAD PASSENGER CORPORATION
LAW DEPARTMENT
60 Massachusetts Ave., N.E.
Washington, D.C. 20002
(202) 906-3000

*MARK S. LANDMAN**
WILLIAM G. BALLAINE,
JYOTI M. FRIEDLAND,
LANDMAN CORSI BALLAINE & FORD P.C.
120 Broadway, 27th Floor
New York, N.Y. 10271
(212) 238-4800

Attorneys for Respondent
* *Counsel of Record*